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# **THE MARKET FOR LEGAL EDUCATION & FREEDOM OF ASSOCIATION: WHY THE “SOLOMON AMENDMENT” IS CONSTITUTIONAL AND LAW SCHOOLS ARE NOT EXPRESSIVE ASSOCIATIONS**

Andrew P. Morriss\*

## **ABSTRACT**

This term the Supreme Court will confront the constitutionality of the Solomon Amendment, which mandates equal access for military recruiters at universities that accept federal funding. The Third Circuit previously held the statute unconstitutional. This Article argues that the Court should reverse and uphold the statute because the lower court failed to consider the cartelized nature of legal education and so assumed that law schools are “expressive associations” entitled to assert First Amendment claims; the court also failed to give proper deference to Congress’s exercise of its Article I power to raise and support armies and over-valued law faculties’ interest in career services offices.

## **INTRODUCTION**

This term the Supreme Court will consider whether Congress may constitutionally require law schools that accept federal funds (or that are part of universities which do so) to allow military recruiters the same access to the law schools’ career services offices that the schools provide to other employers.<sup>1</sup> The answer is straightforward:

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<sup>1</sup> *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir.

Yes. In *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*<sup>2</sup> (hereinafter “*FAIR v. Rumsfeld*”), a divided panel of the U.S. Court of Appeals for the Third Circuit held that the federal statute, known as the “Solomon Amendment,”<sup>3</sup> that imposes this choice on universities violated the First Amendment rights of law schools. Some law schools wish to deny access to military recruiters because the Congressional “Don’t Ask, Don’t Tell” policy on openly homosexual members of the military violates the law schools’ antidiscrimination policies.<sup>4</sup> The Third Circuit’s conclusion was incorrect and should be reversed.<sup>5</sup>

The purpose of this Article is to identify three problems with the Third Circuit panel’s analysis in *FAIR v. Rumsfeld* — problems which should lead the Supreme Court to reverse the decision and uphold the Solomon Amendment.<sup>6</sup> First, the Third Circuit improperly treated the law schools and law faculties as if they were independent entities entitled to assert associational freedom claims. They are not. Second, the Third Circuit undervalued the government’s interest by failing to give sufficient deference to Congress’s power to raise and support the armed forces.<sup>7</sup> Proper deference to Congress’s decision on how to recruit military lawyers changes the result. Third, the Third Circuit overvalued the law schools’ and law faculties’ interests by misunderstanding the nature of legal education and the impact of the Solomon Amendment on it. A correct understanding of these issues compels a result opposite to the one reached by the appeals court. However, any one of these grounds is sufficient to reverse the Third Circuit’s opinion. Together they make a compelling case against FAIR.

Section I briefly discusses the background necessary for these legal arguments. The structure of the market for legal education is critical to the proper understanding of the associational status of law schools and to the appropriate weighing of the government’s and law schools’ interests. I therefore provide a brief summary of the relevant market characteristics. Relatively few of the details of the Solomon Amendment or the underlying “Don’t Ask, Don’t Tell” policy on homosexuality and the military are relevant to the constitutional issues. The Third Circuit opinion focused

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2004), *cert. granted*, 125 S. Ct. 1977 (May 2, 2005) (No. 04-1152).

<sup>2</sup> *Id.*

<sup>3</sup> 10 U.S.C.A. § 983(b) (West Supp. 2005).

<sup>4</sup> See *infra* notes 8–9 and accompanying text.

<sup>5</sup> Additional arguments about why the Third Circuit decision should be reversed are made in an amicus brief in which I participated. Brief Amicus Curiae of Law Professors & Law Students in Support of Petitioners, *Rumsfeld v. FAIR*, 125 S. Ct. 1977 (2005) (No. 04-1152), 2005 WL 1707459 [hereinafter *Amicus Brief of Law Professors and Law Students*].

<sup>6</sup> In addition, through some fairly sharp words, this Article aims to puncture some of the over-inflated rhetoric emanating from FAIR and move the discussion to a more realistic level.

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 12 (“To raise and support Armies”); *id.* cl. 13 (“To provide and maintain a Navy”); *id.* cl. 14 (“To make Rules for the Government and Regulation of the land and naval Forces”).

on irrelevant aspects of each, however, and so I briefly describe the constitutionally relevant aspects of both. Parts II–IV set out the three critiques of the Third Circuit’s opinion listed above. Part V concludes.

### I. LAW SCHOOLS, THE MILITARY’S POLICY ON HOMOSEXUALITY, AND THE SOLOMON AMENDMENT

The clash between the plaintiff law schools and law faculties and the military over the Solomon Amendment is well known and needs only to be briefly summarized to emphasize the points critical to the argument below. (I refer the reader to the multitude of law review articles<sup>8</sup> and both parties’ thorough factual sections in their briefs and other pleadings<sup>9</sup> for a more complete account of the background.) What has not been described in the earlier literature, however, is the structure of the market in legal education. There are important implications of that market structure for the *FAIR* plaintiffs’ ability to assert associational freedom claims. There are also implications for the proper weighing of the interests of both the government and the law schools and law faculties. This section provides the crucial context necessary to resolve the constitutionality of the Solomon Amendment.

#### A. Law Schools and Legal Education

Legal education must be considered as a business.<sup>10</sup> There are an astounding number of law schools issuing J.D. degrees in the United States today (190 American

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<sup>8</sup> See Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205 (2004); Robin Ingli, *Gays in the Military: A Policy Analysis of “Don’t Ask, Don’t Tell” and the Solomon Amendment*, 20 HAMLINE J. PUB. L. & POL’Y 89 (1998); Lindsay Gayle Stevenson, Note, *Military Discrimination on the Basis of Sexual Orientation: “Don’t Ask, Don’t Tell” and the Solomon Amendment*, 37 LOY. L.A. L. REV. 1331 (2004).

<sup>9</sup> See, e.g., Second Amended Complaint at ¶¶ 19–41, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (03 Civ. 4433 (JCL)); Memorandum of Law in Support of Defendants’ Motion to Dismiss and Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 4, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (No. 03 Civ. 4433 (JCL)).

<sup>10</sup> See Richard A. Matasar, *The Two Professionalisms of Legal Education*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 99, 103 (2001) (stating that business and legal education “are inextricably linked. Simply put: [the dean’s] job is running a business.”). See also Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781 (1996). Dean Matasar, now at New York Law School, is one of the most perceptive commentators on the business of legal education; he is also a participant in *FAIR*. See Declaration of Richard Matasar, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (03 Civ. 4433 (JCL)), available at <http://www.law.georgetown.edu/solomon/Documents/Matasar.pdf> (last visited August 5, 2005).

Bar Association-accredited law schools, including seven provisionally accredited,<sup>11</sup> and additional unaccredited law schools<sup>12</sup>), and the number continues to grow.<sup>13</sup> Even more astounding than the number of law schools, however, is the remarkable lack of diversity of approaches to teaching among law schools.<sup>14</sup> Indeed, the primary differences in educational approaches from one American law school to the next seem to lie in the number of required courses and the availability of particular elective courses.<sup>15</sup> This uniformity is particularly striking in the organization of the law schools: schools that dominate the field are staffed by full-time faculty with relatively light teaching loads (compared to other sectors of higher education), place an emphasis on faculty scholarship,<sup>16</sup> and encourage full-time study by students.<sup>17</sup>

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<sup>11</sup> ABA-Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Sept. 13, 2005). In addition, the U.S. Army Judge Advocate General's School is accredited to offer a graduate degree.

<sup>12</sup> California, the largest market for unaccredited law schools, has nineteen accredited by the California Committee of Bar Examiners and twelve completely unaccredited law schools. The Princeton Review, *What You Should Know About Law School Accreditation*, <http://www.princetonreview.com/law/research/articles/find/accreditation.asp> (last visited Sept. 13, 2005).

<sup>13</sup> The number of law schools listed in the ABA's Guide to Legal Education has grown from 145 in 1969 to 190 today. See ABA-Approved Law Schools By Year Approved, <http://www.abanet.org/legaled/approvedlawschools/year.html>.

<sup>14</sup> See Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 28 (2000) ("Greater diversity in legal education would also permit greater diversity in the legal profession and in the career paths of its members."). This lack of diversity is all the more striking given the major changes in the legal profession over the past century. See also Herb D. Vest, *Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494, 497-501 (2000) (attacking ABA accreditation requirements and written by a graduate of an unaccredited law school).

<sup>15</sup> See, e.g., Lawrence C. Foster, *The Impact of the Close Relationship Between American Law Schools and the Practicing Bar*, 51 J. LEGAL EDUC. 346, 347 (2001) ("The first-year curriculum is nearly identical at all American law schools: legal writing and research, contract law, property law, criminal law, torts, and civil procedure, with some law schools also introducing aspects of constitutional law. In the second and third year, most courses are elective.").

<sup>16</sup> Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 373 (1990) ("It is currently the common wisdom that tenure and promotion are attainable at most law schools by faculty who have compiled a record of solid published scholarship coupled with classroom teaching that does not provoke active complaints from students.").

<sup>17</sup> See Rhode, *supra* note 14, at 26.

In a *New York Times Magazine* profile, one faculty member put the point bluntly: whatever its other faults, "law school works pretty well for us." On average, legal academics earn the highest salaries of all university faculty. And the accreditation process protects key aspects of their quality of life, such as tenure, teaching loads, and research support.

*Id.* (citations omitted).

The critical point is this: the legal education market is not a competitive market. The lack of competition should make courts skeptical of the behavior of what gives every appearance of being a cartel.

### 1. Law Schools' Market Power

Most American law schools are accredited by the American Bar Association (ABA).<sup>18</sup> Accreditation allows law school graduates to take the bar in most U.S. states and requires the law schools to adopt a series of policies that reduce competition.<sup>19</sup> Most are also members of the American Association of Law Schools (AALS) (166 of the 190 ABA-accredited schools).<sup>20</sup> Membership in the AALS gives privileged access to a variety of AALS services and is a mark of prestige; however, in Professor Harry First's memorable summary, "AALS membership is no more than a designer label that gives a school (as one group of past AALS presidents put it) 'an intangible *Je-ne-sais-quoi* sort of cachet.'"<sup>21</sup> The real key to the AALS's role is its influence on the accreditation process.<sup>22</sup>

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<sup>18</sup> See ABA-Approved Law Schools, *supra* note 11.

<sup>19</sup> Harry First, *Competition in the Legal Education Industry* (I), 53 N.Y.U. L. REV. 311, 327–28 (1978) [hereinafter First, *Competition I*].

<sup>20</sup> *What is the AALS?*, <http://www.aals.org/about.html> (last visited Sept. 13, 2005). The AALS was formed in 1900 by twenty-five "reputable" law schools in response to a call from the ABA for the creation of an organization to lobby for "academic lawyers." ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 96–97 (1983). Stevens describes the AALS as consisting of "the elite law schools, who dreamed of the day when all but the full-time university-affiliated law schools would have gone the way of the proprietary medical schools." *Id.* at 116.

<sup>21</sup> Harry First, *Competition in the Legal Education Industry* (II): *An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049, 1072–73 (1979) (citation omitted) [hereinafter First, *Competition II*] (describing how an AALS membership is a valuable asset that gives a school prestige and is helpful in attracting students and faculty). First also notes that "there are no real substantive differences between ABA and AALS standards." *Id.* at 1072–73. First summarizes the 1967 AALS presidential address of Wex Malone as follows:

[T]he AALS envisioned itself "as a club of the relatively select, the more prestigious, the higher quality schools," whose standards and ambitions were rapidly escalating. In view of the increasing number of applicants, quality law schools could afford to "skim off the cream, select the best[,] leaving the rejected ones with only the prospect of admission somewhere else." The rejected ones, it was suggested, would become the "legal mechanics," not "drawn from the intellectual elite," who could handle "the oft recurrent problems of simple people with limited funds."

*Id.* at 1056 (citations omitted).

<sup>22</sup> Accreditation teams for AALS member schools include an AALS member who works with the ABA team members. Am. Bar Ass'n Sec. of Legal Educ. and Admissions to the Bar, *Overview of the ABA Accreditation and Site Visit Process and Memorandum Concerning the*

The ABA and the AALS have long worked together<sup>23</sup> to implement a particular model of legal education, which Professor First labels the elitist-preference model, and to exclude competition from other models of legal education.<sup>24</sup> Somewhat more colorfully, Dean Edward Lee of the then unaccredited John Marshall Law School in Chicago alleged in 1924 that this cooperative relationship was the product of a “group of educational racketeers.”<sup>25</sup> To take but one example, the ABA limits the use of adjunct faculty through its standard for student-faculty ratios and a definition of “faculty” that includes only full-time faculty.<sup>26</sup> In short, as Professor George Shepherd notes, “[t]he ABA forces one style of law training, at Rolls-Royce prices.”<sup>27</sup> This precludes schools like the Massachusetts School of Law, which emphasizes practical legal training rather than academic analysis of the law,<sup>28</sup> from being accredited.<sup>29</sup>

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*Conduct of the Site Visit* (2004), at 5, available at <http://www.abanet.org/legaled/accreditation/conductmemo2004.pdf> (last visited Sept. 13, 2005).

<sup>23</sup> The partnership has not always been without conflict. See, e.g., STEVENS, *supra* note 20, at 98–99 (describing differences over elimination of diploma privilege); Donna Fossum, *Law School Accreditation Standards and the Structure of American Legal Education*, 1978 AM. B. FOUND. RES. J. 515, 518 (1978) (discussing disagreements within the ABA over a campaign against part-time, proprietary schools).

<sup>24</sup> First, *Competition I*, *supra* note 19, at 332 (“Predicted anticompetitive conduct, organized by the AALS, has been rampant for more than seventy years. Finally, restrictions on output, lack of innovation, and uniformity — again predicted by applying our economic model to legal education — have successfully been sought.”); *id.* at 342–43 (“[T]he AALS became, like many trade associations, a ‘bureau of standards.’ Mandatory uniform standards, it was believed, would make the AALS ‘more potent in effecting standardization than a mere open forum without standards or responsibility’ could be.” (citations omitted)); Vest, *supra* note 14, at 496.

In response to the swelling ranks of lawyers and the perceived competition from new schools, the ABA teamed up with the Association of American Law Schools to lobby state legislatures and supreme courts to begin requiring graduation from an ABA-approved law school in order to gain admission to the state bars.

*Id.* Professor First notes that this conduct is relatively easy to observe because [t]he legal education industry, unlike other businesses, has been operated on the assumption that it is outside the reach of the Sherman Act. One might therefore expect cartel behavior to be visible rather than suppressed, and collusion to be express rather than tacit. Our study of the industry will bear out these expectations.

First, *Competition I*, *supra* note 19, at 331 (citations omitted).

<sup>25</sup> STEVENS, *supra* note 20, at 175.

<sup>26</sup> Am. Bar Ass’n, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2004–2005, at 16, 33–35 (2004) [hereinafter STANDARDS FOR APPROVAL].

<sup>27</sup> George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 105 (2003).

<sup>28</sup> See Message from Dean Velvel, <http://www.mslaw.edu/dean-Message.htm> (last visited Sept. 13, 2005) (describing MSL’s approach to legal education).

<sup>29</sup> See Peter James Kolovos, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689, 689–90 (1996) (describing MSL approach and

It also has a devastating impact on the access to legal education by poor and minority prospective students.<sup>30</sup>

Of course, the ABA offers justifications for individual ABA accreditation rules connected to concerns about professionalism and educational quality.<sup>31</sup> It is difficult however, to defend the ABA standards individually or in aggregate on these grounds.<sup>32</sup> Again, consider a single example: ABA standards require law schools to make a substantial investment in hard-copy volumes for their libraries.<sup>33</sup> Modern legal research is largely done electronically.<sup>34</sup> It is hard to conceive of the library standards as anything other than a substantial barrier to entry for any firm considering expanding into legal education.<sup>35</sup>

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its failed attempt to obtain accreditation).

<sup>30</sup> Shepherd, *supra* note 27, at 134.

By imposing high costs, the system has closed the legal profession to most people with lower incomes. Because black families have lower incomes and less wealth than most other groups, the high entry price that the ABA imposes is a filter, like the academic accreditation requirements, for eliminating blacks from the legal profession.

*Id.* See also STEVENS, *supra* note 20, at 195 ("Legal education — as one of the by-products of rising standards [in the early twentieth century] — was moving out of the reach of minorities . . .").

<sup>31</sup> For an uncritical statement of the case for ABA standards, see Kolovos, *supra* note 29, at 698–702. Stevens argues that "the motives behind raising standards were numerous" — not simply the economic and anti-immigrant ones proposed by Professor First and others. STEVENS, *supra* note 20, at 100. He concedes, however, that "wherever one looks in the literature of the period, the establishment expressed concern about the background of those who were alleged to be demeaning the bar." *Id.* at 101.

<sup>32</sup> See, e.g., Shepherd, *supra* note 27, at 107 (arguing that "the ABA's rigid forms of accreditation and the bar exam may have caused malpractice and fraud to be more frequent in law than in other fields."); *id.* at 110 ("Although the ABA asserted that tough bar exams and accreditation were necessary for consumer protection, the calls for consumer protection came only when many new minority lawyers were beginning to compete effectively with the ABA's members."); see also Fossum, *supra* note 23, at 541 (calling for a thorough validation study of ABA standards after concluding that existing evidence was inadequate).

<sup>33</sup> STANDARDS FOR APPROVAL, *supra* note 26, at 46–47. Professor Shepherd reports that "[t]he ABA requires a minimum expenditure on library operations and acquisitions of about \$1 million per year. One head law librarian and member of many accreditation teams indicated that \$1 million was the minimum, not including the cost of overhead for the library building and of computer technology." Shepherd, *supra* note 27, at 132–33. Professor Shepherd calculated the average cost per student of complying with this standard was more than \$4,000 in 1999 based on spending by recently accredited schools. *Id.* at 133.

<sup>34</sup> See, e.g., Catherine Sanders Reach, David Whelan, & Molly Flood, *Feasibility and Viability of the Digital Library in a Private Law Firm*, 95 LAW LIBR. J. 369 (2003) (describing the potential for electronic legal research to replace print research, reporting survey evidence that shows possibility is both feasible and viable, and determining that barriers are largely non-technical).

<sup>35</sup> First, *Competition I*, *supra* note 19, at 331; see also First, *Competition II*, *supra* note



The ABA and the AALS go beyond straightforward criteria such as the library rules; both prescribe elaborate and vague sets of requirements a school must meet to be accredited (the ABA)<sup>36</sup> or to be a member (the AALS).<sup>37</sup> The combination of ABA accreditation and AALS membership commits the school to a number of “elitist-preference” strategies.<sup>38</sup> Professor First concluded in 1978 that “[t]he mechanism of industry self-regulation erected in the 1920’s remains solidly intact today, and it operates to protect law schools from competition. The partners in regulation, the AALS and the ABA, work closely together.”<sup>39</sup> Moreover, he found that:

the long-term effect of private industry regulation has been negative. Output has been restrained; new schools face significant entry barriers; innovation has been discouraged. The regulatory mechanism, on the other hand, has actually been strengthened since 1963, and the AALS and ABA together keep a firm grip on the industry.<sup>40</sup>

Although the analysis by Professor First on which much of the above discussion is based was completed in the 1970s, others have reached similar conclusions more recently.<sup>41</sup>

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21, at 1053–54 (describing costs of joining for new schools: the 1965 AALS Guideline Statement on the Establishment of New Law Schools set out the criteria for new member schools, which included more than \$1,000,000 in capital costs, excluding land costs, \$50,000 per year in book costs, three full-time library staff, a requirement to pay “average or median salary for comparable schools” for a predominantly full-time faculty, and more than \$480,000 in start up non-capital costs).

<sup>36</sup> The process for ABA accreditation takes at least three years (including a “provisional accreditation” period). During this time, the ABA determines if the law school is “consistent with sound legal education principles” by adhering to the ABA *Standards for Approval*. STANDARDS FOR APPROVAL, *supra* note 26, at 9, 11. Even the ABA’s fans concede these standards are “a complex set of standards dealing with a wide range of issues.” Foster, *supra* note 15, at 346. Somewhat remarkably, in 1973 the ABA deleted the precise interpretations of its standards from the official publication, meaning that “the actual meanings of the standards were no longer ascertainable from their language alone.” Fossum, *supra* note 23, at 521, n.26. The interpretations were published separately several years later. *Id.*

<sup>37</sup> Even though the AALS has accreditation requirements separate from the ABA, see Association of American Law Schools, Bylaws of the AALS (2004), the ABA and the AALS have similar goals and interests. At times, the same AALS accreditation personnel are also ABA accreditation personnel, which has created accusations of a conspiracy between the two associations. See *Mass. Sch. of Law at Andover, Inc. v. ABA*, 142 F.3d. 26 (1st Cir. 1998).

<sup>38</sup> First, *Competition I*, *supra* note 19, at 329. “Elitist-preference” strategies are features of legal education that structure it to benefit law faculties at the expense of law students and other interests. They are described in more detail in note 41 and accompanying text.

<sup>39</sup> First, *Competition II*, *supra* note 21, at 1078.

<sup>40</sup> *Id.* at 1088.

<sup>41</sup> See, e.g., Ronald A. Cass, *So, Why Do You Want to be a Lawyer? What the ABA, the AALS, and U.S. News Don’t Know That We Do*, 31 U. TOL. L. REV. 573, 576 (2000) (former

The ABA-AALS alliance was remarkably successful in implementing its preferred model of legal education. By 1958, only eight percent of law students were not in ABA-approved schools;<sup>42</sup> 66 percent had been in AALS-unapproved schools in 1928.<sup>43</sup> The transition to an elitist-preference model of legal education has had important impacts on legal education. For example, the AALS-ABA attempts to “improve” law schools have introduced serious ethnic and class biases into legal education,<sup>44</sup> biases which remain today.<sup>45</sup> Legal education is regularly criticized by

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dean of Boston University Law School noting that “[b]oth accrediting organizations [ABA and AALS] have pushed hard to make U.S. legal education more homogeneous, to encourage schools to focus on inputs, and to divert resources from their best uses for legal education.”); John S. Elson, *The Governmental Maintenance of the Privilege of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN’S J. LEGAL COMMENT. 269 (2001).

The primary reason American legal education so effectively entrenches the wealthy and denies access to the non-wealthy is that it operates as a rent-seeking cartel which in its essential aspects acts just like other industry cartels that use governmental restrictions on market entry in order to boost their members’ profits.

*Id.* at 270. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998).

Many of the participants in the accreditation system are public-spirited and selfless. However, economic analysis leads us to conclude reluctantly that the system has imposed large harms. Existing law faculty have gained, on balance, at the expense of their students, of their universities, and of other potential faculty members to whom the system denies teaching jobs. By suppressing potential new schools that would offer cheaper, more-efficient legal education, the system has excluded many from the legal profession, particularly the poor and minorities. It has raised the cost of legal services. And it has, in effect, denied legal services to whole segments of our society.

*Id.* at 2094.

<sup>42</sup> STEVENS, *supra* note 20, at 207. For additional figures see Fossum, *supra* note 23, at 523.

<sup>43</sup> STEVENS, *supra* note 20, at 174. Over a bit longer period, law school revenues soared: from \$17 million in 1948 to \$275 million in 1976, an almost seven-fold increase in real dollars. *Id.* at 235. The hypothesis that the two changes are related is one that springs immediately to mind.

<sup>44</sup> Robert W. Gordon, *The Case For (and Against) Harvard*, 93 MICH. L. REV. 1231, 1241 (1995) (reviewing WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994)) (stating that development of the elitist-preference model law schools was a “godsend” for an elite bar seeking to “redeem themselves from complicity in the piratical practices of some of their business clients and in part to distinguish themselves as a meritocratic caste from both new-wealth businessmen and from what they perceived to be the — increasingly immigrant — riffraff of the profession”).

<sup>45</sup> First, *Competition I*, *supra* note 19, at 362–63; Shepherd, *supra* note 27, at 106 (terming ABA accreditation “a deeply discriminatory system with roots in a racist past”).

the bar for failing to adequately train lawyers in the practice of law.<sup>46</sup> ABA accreditation standards prevent alternative methods of legal education, such as correspondence schools<sup>47</sup> and many part-time programs.<sup>48</sup>

The point is not whether the elitist-preference model of legal education is better than any particular alternative. The point is simply that the lack of deviation from the ABA- and AALS-endorsed model of legal education is not the result of a competitive market for legal education.<sup>49</sup> This cartel behavior allows those who control law schools to engage in what economists term "rent-seeking."<sup>50</sup> That such

<sup>46</sup> See, e.g., ABA Sec. of Legal Educ. & Admissions to the Bar, *Legal Education and Professional Development — An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992). See also Rhode, *supra* note 14, at 36 ("Law schools claim, above all else, to teach students how to 'think like a lawyer.' In fact, they often teach students how to think like a law professor, in a form distanced and detached from human contexts.").

<sup>47</sup> See, e.g., Vest, *supra* note 14, at 501 (discussing Concord School of Law, a correspondence school).

<sup>48</sup> See, e.g., *In re Laclede Sch. of Law*, 700 S.W.2d 81 (Mo. 1985) (denying state accreditation to only school offering evening legal education in Missouri).

<sup>49</sup> First, *Competition I*, *supra* note 19, at 343–47. The AALS adopted a host of requirements that brought schools into the elitist preference model: restrictions on night schools, the requirement of pre-professional education, the ban on proprietary schools, and the full-time faculty requirement. As Professor First summarized:

The elite-model law school will thus seek market control, just as a profit-maximizing firm would, following strategies that can increase the intensity of demand for its product and decrease the elasticity of demand. Like the classical business firm, too, the law school will restrict output. But rather than raising its price, it will keep its price at the minimum level that satisfies its revenue constraint. Demand will exceed supply at the price charged, so that the law school can then satisfy its nonmonetary elitist preference for the "brightest" students. At that price/output level, the school will also be less subject to economic pressure — thus satisfying another elitist preference — since there will always be a comfortable excess in the number of customers. The hypothesized firm, therefore, should follow traditional economic strategies, but for the purpose of freeing itself from economic discipline. Rather than profit, the law school firm seeks freedom.

*Id.* at 325–26 (citations omitted).

<sup>50</sup> See THE MIT DICTIONARY OF MODERN ECONOMICS 373 (David W. Pearce ed., 4th ed. 1992) (defining rent seeking as "[t]he use of real resources in an attempt to appropriate a surplus in the form of a rent"). Robert Stevens's history of legal education opens by noting that:

[t]he leading American law schools appear to have an entrenched position of power in the profession, in academic life, and, indeed, in the country at large, a position that is frequently denied to the academic branches of the profession in other industrialized societies . . . Law professors within the university appear to live something of a charmed

rent-seeking has occurred seems indisputable — the former ABA standards on faculty salaries and the practice of sharing salary data among accredited law schools, eliminated after the Justice Department brought a civil antitrust action against the ABA, prove the point.<sup>51</sup> Similarly, the library standards, “a wish list for faculty and law librarians” financed by students or state subsidies, are a clear instance of indulging faculty preferences at a substantial cost.<sup>52</sup> We, and the courts, thus have reason to be skeptical of the *FAIR* plaintiffs’ rhetoric and the cloaking of their actions in academic justifications. More importantly for consideration of the Solomon Amendment, because ABA-accredited law schools have a chokehold on American legal education, they have an equally vigorous grip on law graduates’ post-graduate employment opportunities.<sup>53</sup>

## 2. The Structure of the Market for Law Graduates

The second aspect of the market structure which is important to consider in the *FAIR* plaintiffs’ claims is the structure of the job market for new law school graduates. The crux of the dispute between Congress and the *FAIR* plaintiffs is access to law schools’ on-campus career services offices. Although all ABA-accredited law school graduates potentially have access to a national job market (via their eligibility for various states’ bar exams),<sup>54</sup> in practice many legal employers

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life.

STEVENS, *supra* note 20, at xiii.

<sup>51</sup> Notice, 60 Fed. Reg. 63,766 (Dec. 12, 1995); *United States v. Am. Bar Ass’n: Proposed Final Judgment and Competitive Impact Statement*, 60 Fed. Reg. 39,421 (Aug. 2, 1995). The former ABA Standard 405(a) provided that accredited law schools had to offer faculty salaries “reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and of the judiciary [and] comparable with that paid [law school] faculty members . . . in the same general geographical area.” Kolovos, *supra* note 29, at 721 n.177. The salary standard was defended on the ground that it helped attract “high-quality faculty” from the private sector. *Id.* at 721. Market pressures are so self-evidently capable of accomplishing this that the justification is patently ridiculous. If the ABA directly regulated faculty quality, for example, it would force law schools to pay whatever salaries were necessary to recruit sufficient quality faculty to maintain their accreditation. Of course, that would require the ABA to articulate what constituted “quality” faculty, something that might prove controversial, and would not require awarding salary increases to existing faculty.

<sup>52</sup> Shepherd, *supra* note 27, at 132.

<sup>53</sup> Indeed, they have a grip on JAG Corps opportunities generally. *See, e.g.*, The Official Web Site of the United States Navy JAG, FAQs, <http://www.jag.navy.mil/Careers/CareersFAQ3.htm> (last visited August 5, 2005) (stating that student program applicants “must be attending a law school approved by the ABA”).

<sup>54</sup> Twenty-two of the fifty states limit the bar exam to those who have graduated from an ABA-accredited law school. Ten more allow graduates of unaccredited schools to take the bar only if they have practiced for several years already, effectively barring new graduates

hire primarily through a process that includes an on-campus interview component.<sup>55</sup> Law schools are required by an ABA standard adopted in the 1970s to provide an "active" placement effort.<sup>56</sup>

Law school applicants care quite a bit about law schools' ability to deliver employers to the on-campus program<sup>57</sup> and access to different types of legal jobs

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from unaccredited schools. Seven more limit the bar to graduates from unaccredited schools approved by the state. Seven allow law office study for a specified number of years in addition to graduation from an ABA-accredited school. Thus, for first time bar takers graduating from a law school, thirty-four of the fifty-one jurisdictions (including D.C.) effectively require either an ABA-accredited school or a state-approved school. Only graduation from an ABA-accredited school permits one to take the bar in all fifty-one jurisdictions. AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2004, at 10–13 Chart III (2004).

<sup>55</sup> For a thorough discussion of the hiring process, which explains the role and importance of the on-campus process and law schools' strong bargaining position in setting the terms of the process, see Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909 (2004).

Offices of career services have become a crucial component of a law school as pressures to place students in high-paying law firms have increased. The placement rate for students is a component of the influential *U.S. News & World Report* ranking system, which has significantly modified internal aspects of law school organization. One component of this has been greater pressure on schools to devote resources to placing students.

*Id.* at 922 (citation omitted). Additional useful discussion of the hiring process is given in David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213 (2001). See also Abbie Willard Thorner, *Legal Education in the Recruitment Marketplace: Decades of Change*, 1987 DUKE L.J. 276 (1987).

Employers of all sizes and types vie for the best and brightest in the second- and third-year classes of law schools across the nation. No longer is on-campus law school recruiting the domain solely of the large firm or government agency. Within the last decade, medium and smaller firms, public interest organizations, corporations, and businesses have arranged interview dates nine to twelve months in advance of law students' employment availability. More and more employers are requesting interviews with or direct contact from students at law schools of all sizes, geographic locations, and reputations.

*Id.* at 280.

<sup>56</sup> See John D. Feerick, *Job-Placement Services Needed in Law Schools*, NAT'L. L.J. (Dec. 31, 1984) at 24 (quoting 1978 standard); see also STANDARDS FOR APPROVAL, *supra* note 26, at 44.

<sup>57</sup> Feerick, *supra* note 56, at 24 (stating that the placement office "is increasingly responsible for helping to attract students to law schools"). Placement offices are a relatively new development; as late as the early 1970s, there were only about twenty-five at law schools. *Id.*

through these programs varies dramatically across law schools.<sup>58</sup> For example, Am Law 200<sup>59</sup> law firms' participation in on-campus interview programs significantly favors the law schools ranked highest in the *U.S. News & World Report* rankings of legal education.<sup>60</sup> In this and other ways, the elite schools offer their graduates much greater opportunities for highly desirable jobs with these firms,<sup>61</sup> and that access is one of the key factors which distinguish elite law schools from their competitors in prospective students' eyes. It would not be unreasonable to view these schools' provision to their students of the extraordinarily valuable access to Am Law 200 employers as a key component of the composite "legal education good" they sell to the students. It is implausible, however, that the desired characteristic being sold is the faculty's review of the employers involved for compliance with the faculty's preferences about appropriate employers.

Indeed, the elite law schools' market power within legal education is substantial.<sup>62</sup> They control access to the "best" law students,<sup>63</sup> a desirable group of recruits for law firms and other legal employers, and also offer students the most opportunities for access to the "best" jobs, as measured by salary or firm prestige in the private sector and prestige in the public sector (including access to the most prestigious judicial clerkships). In an economic sense, the top strata of American

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<sup>58</sup> William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 176–200 (2005); see also Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433 (1989).

[N]o law school would define educational success solely according to the market as reflected in the starting salaries of its graduates. Law schools do, however, like to report salary figures as well as the percentage of students with jobs at graduation, the number of firms who come to the school to recruit, and the number of places where students go to practice, and all of those figures relate directly to recruiting by the large law firms.

*Id.* at 433 n.3.

<sup>59</sup> "Am Law 200" firms are those listed in the *American Lawyer* magazine survey of the top 200 law firms.

<sup>60</sup> Henderson & Morriss, *supra* note 58, at 189. Other important factors include the location of the school in an area where a firm has an office and the percentage of minority students enrolled in a school. *Id.* at 189–90.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U.L. REV. 1141, 1145–46 (2003) ("Harvard Law School could double tuition, or give all students 'A's,' or double the average class size to reduce faculty teaching loads without fear of losing many students to schools outside the 'top 10.'").

<sup>63</sup> Assuming "best" means highest entering credentials, based largely on LSAT scores and undergraduate GPAs.

law schools thus operate an employment matching service, bringing together the “best” students and “best” employers.<sup>64</sup>

Participation in on-campus interviewing at these top schools is valuable for legal employers, as can be seen by the disproportionate number of Am Law 200 firms conducting such interviews at the top sixteen and top fifty law schools (as ranked by *U.S. News*) compared to lower ranked schools.<sup>65</sup> We thus have strong revealed preference evidence that access to on-campus interviewing is valuable for legal employers, particularly at the “best” schools, and that students highly value access to employers in selecting which law school to attend.<sup>66</sup> This is important information, for both FAIR and the Third Circuit disparaged the usefulness of on-campus interviewing for the military.<sup>67</sup>

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<sup>64</sup> See Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998) (arguing that *U.S. News* rankings have facilitated this function).

<sup>65</sup> Henderson & Morriss, *supra* note 58, at 189-90.

<sup>66</sup> Law schools certainly seem to think so, for they regularly tout the number and variety of employers who visit their on-campus recruiting programs. See, e.g., Vanderbilt University Law School Career Services, <http://law.vanderbilt.edu/career> (“Employers from nearly 550 offices, representing 30 states, come to Vanderbilt’s campus each fall. In addition to on-campus interviews, hundreds of legal employers annually solicit letters of interest and resumes from our students.”); Cornell Law School Career Services, <http://www.lawschool.cornell.edu/admissions/careerservices> (“Our reputation for producing high-caliber lawyers makes our graduates some of the most heavily recruited in the country.”); Wayne State University Law School Career Services, <http://www.bulletins.wayne.edu/gbk-output/law7.html> (“During several weeks in the fall, and again in the spring, the office coordinates on-campus interviews with over 100 employers.”); Yale Law School Career Development Office, [http://www.law.yale.edu/outside/html/Career\\_Development/cdo-jdfip2005.htm](http://www.law.yale.edu/outside/html/Career_Development/cdo-jdfip2005.htm) (“Hundreds of employers are already registered for [the Fall Interview Program].”); Recruiting at Boston College Law School, <http://www.bc.edu/schools/law/meta-elements/pdf/recruiting05.pdf> (“Last year several hundred employers visited Boston College Law School and conducted over 3,700 interviews for summer and permanent positions.”); Feerick, *supra* note 56, at 29 (“Judging from the material that passes over a dean’s desk every day, law schools increasingly are referring to their placement programs in their fund-raising appeals to alumni and their promotional literature to prospective students.”). Career services professionals also stress the importance of the OCI process. See, e.g., Sandra L. Mans, *Your Law School Career Services Offices — An Effective Way to Hire*, 70 N.Y. ST. B.J. 32 (1998).

If an employer has lead time one of the most cost-effective and time-efficient ways to hire is to interview on-campus (i.e., a scheduled visit to the law school). . . . A benefit of on-campus interviewing is that employers receive first-class treatment and most find the interview day to be a pleasant experience.

*Id.* at 32.

<sup>67</sup> Reply Brief for Appellants at 24, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433).

Under the Solomon Amendment, a school could grant military recruiters access to campus, but require them [*sic*] set up their tables

Why might on-campus interviewing be useful to the military? Economic logic provides a rationale. There are three groups of students in any law school (and membership in any of them will range from 0–100 percent of the student body): those definitely interested in careers in the military, those definitely not interested, and those without a firm opinion. The first group will certainly seek out military recruiters regardless of the existence of an on-campus interview program; the second group will not even if the on-campus program is present. The military's interest lies with the third group. For those without a definitive opinion about a military law career, locating an interview program on-campus lowers the cost of acquiring more information about the military and military legal careers. There are thus likely to be some students who will attend an on-campus program (because the cost is low) with a military recruiter who won't attend an off-campus program (because the cost in time and effort is higher). If the military is not simply looking for a fixed number of bodies but has an interest in maximizing the overall quality of its lawyers, as it surely does, increasing the size of the pool of potential recruits serves the military's recruitment interest.<sup>68</sup>

Even if we take at face value the *FAIR* plaintiffs' claim that law schools' and law faculties' control of participation in their on-campus interview programs<sup>69</sup> is

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just inside the campus gates. Without the Solomon Amendment, the recruiters could set up their tables just outside the campus gates. Neither Congress nor the District Court had before it any evidence that the former would be more effective than the latter, much less that it would be so much more effective as to justify the trammeling of the rights of a few resisting institutions.

*Id.* See also *FAIR*, 390 F.3d at 235 (“[N]ot only might other methods of recruitment yield acceptable results, they might actually fare better than the current system.”).

<sup>68</sup> This brings us quite directly back to the inconvenient language in the Constitution about “raising and supporting” the military forces. See *supra* note 7.

<sup>69</sup> Curiously, the AALS policy does not prohibit career services offices' complicity in discriminatory recruiting entirely (law schools routinely provide transcripts for military employers, for example). Nor do the standards require any attempt to verify employers' compliance with the signed policy. See *infra* notes 231–33 and accompanying text. The AALS and faculty interest in career services offices is comparatively recent. In a brief history of placement efforts, one law school career placement official noted that “[o]nce upon a time, law schools were in the business of educating and training new lawyers. Period. Before the early 1960's, few law schools devoted significant attention to precise admission criteria. At the other end of the legal education process, few schools devoted much attention to job placement.” Thorner, *supra* note 55, at 276 (citation omitted). As Dean Thorner notes, it was the boom in law school attendance in the 1970s that made the law school career services offices become important parts of getting a job, *id.* at 277, a boom that allowed law schools to exploit their oligopolistic position. Interestingly, in the mid-1980s the president of the AALS did not seem to be aware of the vital educational purpose of career services operations. Professor Roger Crampton, then-AALS president, wrote in 1985 that “[l]aw placement as a whole is now an engine totally out of anyone's control, a market response to the cumu-



“about the freedom of law schools to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government intrusion,”<sup>70</sup> we can see that this is at best an incomplete statement of the role of law school career services offices.<sup>71</sup> Law students have interests in the operation of this matching service which are independent of law faculties’ interests; this is, after all, where many law students will find their first jobs. Students in the undecided group have an interest in having the maximum range of potential employers present on campus. Legal employers, including the government, also have an interest in the operation of this job market. Indeed, the federal and various state governments already heavily regulate the operation of law schools’ career services offices through educational privacy,<sup>72</sup> antidiscrimination, and other employment-regulatory laws. Any interest of law faculties or law schools in the operation of career services offices is thus already heavily circumscribed by public interests (as expressed in regulatory statutes) — in short, there is a great deal of government intrusion already going on. Viewed in this light, the Solomon Amendment is just one of many government intrusions into the operation of the law schools’ career services offices.<sup>73</sup> This suggests that what we must be concerned with is the marginal impact of this final regulatory constraint on law schools’ career services offices, an impact that is far smaller than the marginal impact of a host of other extant regulations.<sup>74</sup>

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lative actions of thousands of legal employers and job candidates, with law schools as the intermediaries and the education program as the victim.” *Id.* at 280 n.6 (quoting Roger Cramton, *President’s Message on Improving Student Placement*, AALS NEWSL., Sept. 1985, at 2).

<sup>70</sup> Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 1, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03 Civ. 4433 (JCL)) [hereinafter Plaintiffs’ Trial Brief]. FAIR’s members were notably silent in the debate over whether Bob Jones University got to do this. It didn’t. Consider also the position of most law school faculties on the ranking of students by GPA. My own experience suggests that class rank is primarily provided by law schools as a service to large law firms, who desire a quick means of sorting prospective hires. Ranking students solely on the basis of grades certainly sends an effective message to law firms and law students alike. It also seems strikingly inconsistent with the sort of message FAIR’s members endorse. This sort of craven caving-in to market pressures exerted by large law firms serving primarily elite clients, as most law schools do, is almost enough to make one suspect that the message FAIR wishes to send has less to do with discrimination and more to do with the employer in question.

<sup>71</sup> Note too that the ABA bars academic credit for CSO activities. *See infra* note 241.

<sup>72</sup> Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2004).

<sup>73</sup> Perhaps FAIR’s members simply do not object to these other statutes. Presumably they like Title VII, for example. Their position begins to sound suspiciously unprincipled, however, when they fail to stand up for the universities, colleges, law schools, and other institutions that might object to such standards. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>74</sup> *See, e.g., Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 627 (1988) (holding that privacy interests are diminished by participation in heavily regulated industry).

### 3. University Affiliation

The third relevant market characteristic of legal education today is the predominance of university-affiliated law schools. Of the 190 ABA-accredited law schools, for example, only a few are not currently affiliated with a university.<sup>75</sup> This was not always so. At the beginning of the twentieth century, when even formal law school education was still not the dominant means of becoming a lawyer,<sup>76</sup> many law schools were proprietary schools unaffiliated with a university.<sup>77</sup> Some were even operated for a profit by their owners.<sup>78</sup> In the early twentieth century, legal education was in the midst of a transformation, led by the AALS and ABA, from a quite profitable business that lacked the elitist-preference characteristics into an academic enterprise that provided them. Faculty preferences drove this transformation:

Many law teachers in the beginning of the twentieth century . . . were uncomfortable with [the stand-alone, for profit model]. They were not educational entrepreneurs, nor did they wish to practice law actively. Pursuing nonpecuniary goals, some of them brought the spirit of Progressive reform to the law teaching profession. They viewed law as an instrument of social change and began to stress the need to teach new lawyers that they must meet their social obligations, not simply make money. And they also saw that they had the opportunity to shape those who would write future laws. Elitist preference began to emerge.<sup>79</sup>

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<sup>75</sup> New York Law School and Brooklyn Law School are prominent examples. I am not concerned that these schools might have distinct claims, both because the law faculty of each remains subordinate to its board and because my conversations with a number of administrators at a variety of law schools convinces me that law schools generally do not receive sufficient federal funds for the Solomon Amendment to be relevant to their decision-making absent their connection to universities.

<sup>76</sup> Shepherd, *supra* note 27, at 108–09.

<sup>77</sup> See STEVENS, *supra* note 20, at 75–76 (detailing “massive expansion” in “part-time legal education, especially in schools unrelated to universities” after 1900).

<sup>78</sup> Shepherd, *supra* note 27, at 109.

<sup>79</sup> First, *Competition I*, *supra* note 19, at 339 (citations omitted). The road to an elitist model of legal education was not free of detours and wrong turns, of course. From 1900–1920, for example, AALS member schools lost market share to non-members, *id.* at 347–48, and the ABA itself took time to consider and fully embrace the elitist model. STEVENS, *supra* note 20, at 114–16 (discussing differences between the two organizations). However, the two organizations eventually joined together to combat the non-AALS law schools. First, *Competition I*, *supra* note 19, at 351–60. For evidence of the continuing priority law schools give to “law reform” efforts, consider the following 1997 quote from then-AALS President and NYU Law School Dean John Sexton:

America’s lawyers have been charged with setting the nation’s values

Law schools could not simply switch to the elitist-preference model, however. Price competition from non-elitist-preference schools limited the elitist-preference schools' ability to raise prices or limit entry.<sup>80</sup> Financing the elitist-preference schools' interest in scholarship and law reform efforts required additional resources. Implementing law faculties' taste for promoting social change by converting law schools into elitist-preference model schools thus required limiting price competition from other types of law schools and securing stable revenue sources to provide the consistent funding needed to pay for scholarship and law reform efforts.

One of the solutions to these problems was for law schools to shift away from the proprietary form of organization and to become university-affiliated, academic schools.<sup>81</sup> As Professor First notes, "[I]t was quickly recognized that the best way to free law schools from dependence on consumer [i.e. student] control was to latch

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— a charge that runs not only to "great cases" and major reform movements, but also to the lawyer's day to day dealing with clients. In our society, lawyers are and must be the conscience of both the legal system and the client — for if they are not, no one will be.

John Sexton, *Restoring the Notion That Lawyers Are Society's Conscience*, AALS NEWSL., Apr. 1997, at 1. Similarly, Professor Anthony D'Amato wrote in a 1990 law review article:

[T]he legal profession has nothing to do with serving law and everything to do with serving justice. To say that a lawyer is bound by "law" is in effect to enlist lawyers in implementing the state's policies, whether those policies be enlightened or brutal. It is to a dictator's advantage to say that lawyers should be guided by "law." But "law" is not worth being guided by, except to the extent that it reflects justice. If we don't say that a plumber serves his tools, we should not say that a lawyer serves the law. To the extent that we lawyers are professionals, our allegiance is to justice in society.

Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 187 n.135 (1990). For a thorough critique of this attitude, see Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUTGERS L.J. 143 (1998).

<sup>80</sup> First, *Competition I*, *supra* note 19, at 348.

<sup>81</sup> *Id.* at 342.

We may thus view the reasons for a three-year course and a university affiliation in terms of the law school's need for money. Both are useful in meeting elitist preferences — being a fulltime law teacher free from nonpeer control — and both are necessary to meet the revenue requirements of the elite-model law school. Although the three-year requirement could serve the profit-maximizing law school as well, university affiliation was clearly a way of obtaining revenue while avoiding profit-maximizing behavior.

*Id.* Another solution was implementing a mandatory three-year program of study, something consistently justified as preventing competition from undermining the academic approach to legal training rather than for its intrinsic academic value. *Id.* at 338 (finding that a three-year course was a means of controlling inter-member competition for AALS.).

on to the assets of universities.”<sup>82</sup> University affiliation was a deliberate strategy undertaken to give law school faculties the resources to pursue the elitist-preference model of legal education. The law schools traded their independence for financial security and the prestige of university affiliation.<sup>83</sup>

The critical point here is that American legal education developed into a model of university-affiliated law schools in response to the desire of law schools and law faculties for stable funding and prestige to enable them to focus their efforts on law reform and scholarship. University affiliation, which I will argue below has important consequences for the associational freedom claims made by the *FAIR* plaintiffs, is not necessary for legal education, however. To the extent their relationship with universities has costs for law schools, those costs must be seen in light of the law schools’ voluntary assumption of the relationship.

#### 4. Summary

From this brief account of the historical development and market structure of legal education come the following facts relevant to our consideration of the Solomon Amendment. First, legal education is a business, albeit one dominated by non-profit organizations. Second, it is a business with significant cartelized features, due to the efforts of the ABA and AALS to implement the elitist-preference model of education. Third, the elitist-preference model has significant costs for the consumers of legal

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<sup>82</sup> *Id.* at 341. First cites a 1906 lecture by Eugene Gilmore, a University of Wisconsin law professor titled “The Relation of the University to Professional Instruction.”

It was not enough for a law school to be affiliated with a university. He felt there must be an end to the relationship, “which unfortunately still exists” in many universities, in which the law school is a separate school “conducted on a self-supporting basis with different standards and ideals.” Rather, it must be placed “on the same footing as other instruction in the university.”

*Id.* at 341–42. See also STEVENS, *supra* note 20, at 77–79 (describing some of the affiliation agreements).

<sup>83</sup> Not all of the elitist-preferences strategies worked out as planned. For example, during the booming legal education market of 1920s, law schools experienced enormous increases in revenues, only to see much of the money siphoned away by their affiliated universities. First, *Competition I*, *supra* note 19, at 364. Rather than providing the law schools with secure financing, many universities treated the law schools as a source of funds for other programs. The alliance with universities as funding mechanisms “backfired badly: universities consistently tapped the law schools.” *Id.* at 397 (citation omitted). See also Shepherd & Shepherd, *supra* note 41, at 2106–07; STEVENS, *supra* note 20, at 268–69 (discussing intra-university competition for resources). This is not to say that all law school-university partnerships have been unfruitful. The interconnections between the law school and economics department at Chicago, for example, have greatly benefited both programs. There are relatively few such examples, however. The degree of the university “tax” on law schools’ revenue remains an issue of concern in ABA-accreditation and AALS-membership inspections today.

education, the consumers of legal services, and society as a whole. Taken together, these facts suggest that less weight should be given to the interests of law schools and law faculties in preserving cartel-enhancing features of legal education than the *FAIR* plaintiffs contend. These facts also have troubling implications for the *FAIR* plaintiffs' assertion of associational freedom claims.

### B. "Don't Ask, Don't Tell"

The root cause of the dispute in *FAIR v. Rumsfeld* is the clash of law schools' antidiscrimination policies, which include sexual orientation as a prohibited basis for discrimination, and the congressionally-mandated military policies toward homosexuals, which require such discrimination. Since 1993, the military policy on homosexuals serving in the military has been the "Don't Ask, Don't Tell" policy adopted by Congress in response to the Clinton Administration's initial expression of interest in eliminating the prior complete ban on homosexuals serving in the military.<sup>84</sup> It may be that Congress is mistaken in its judgment or in the factual predicates that underlie its policy decisions, but Congress's "stated objectives were . . . couched in strikingly pragmatic and non-judgmental terms — overt homosexuality was to be purged because it damaged unit cohesion, moral [*sic*] and discipline, and not because it was immoral or illegal."<sup>85</sup>

The policy was challenged on constitutional grounds and upheld by several of the federal circuit courts of appeals.<sup>86</sup> Congress's "Don't Ask, Don't Tell" policy is (at least according to the courts) a lawful and constitutional policy, regardless of its merits with respect to either the state's treatment of homosexuals or the effectiveness of the military.<sup>87</sup> Only two facts concerning the "Don't Ask, Don't

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<sup>84</sup> See Eugene R. Milhizer, "Don't Ask, Don't Tell": A Qualified Defense, 21 HOFSTRA LAB. & EMP. L.J. 349, 351–66 (2004) (describing the adoption of the policy in detail); David F. Burrelli & Charles Dale, *Homosexuals and U.S. Military Policy: Current Issues*, CRS Report for Congress, RL 30113, at CRS-1–CRS-6 (updated May 27, 2005), available at [http://www.gaymilitary.ucsb.edu/ResearchResources/2005-06\\_CRS.pdf](http://www.gaymilitary.ucsb.edu/ResearchResources/2005-06_CRS.pdf) (last visited Aug. 6, 2005) (detailing the enactment of the policy).

<sup>85</sup> Milhizer, *supra* note 84, at 361 (citation omitted).

<sup>86</sup> See *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999).

<sup>87</sup> After the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the constitutionality of the policy was questioned by some commentators. See, e.g., Stevenson, *supra* note 8, at 1338 (stating *Lawrence's* overturning of *Bowers v. Hardwick* eliminated "two related grounds for upholding regulations that discriminate on the basis of sexual orientation"); Burrelli & Dale, *supra* note 84, at CRS-13–CRS-14 (describing post-*Lawrence* issues). Until the courts rule on any new issues for "Don't Ask, Don't Tell" resulting from *Lawrence*, however, the policy remains legal and constitutional. I must confess that I do not know whether the "Don't Ask, Don't Tell" policy is a good policy or not. It certainly seems foolish to me to exclude an entire category of citizens from service, and my own experience with openly gay colleagues and friends leaves me puzzled why Congress believes the

Tell” policy are relevant to consideration of the Solomon Amendment’s constitutionality: (1) the courts have affirmed that the policy is a valid exercise of Congress’s constitutionally-granted powers over the military; and (2) it is a policy instituted by Congress, not by the armed forces.

### C. *The Solomon Amendment*

According to the *FAIR* plaintiffs, law schools began gradually to expand the scope of the application of their nondiscrimination principle to sexual orientation in the 1970s.<sup>88</sup> This led the AALS to include nondiscrimination on the basis of sexual orientation among its mandatory membership policies in 1990.<sup>89</sup> (Although the plaintiffs do not mention this, the timing coincided with a downturn in new graduate hiring that prompted a crisis among new graduates and greater interest by graduating students in non-law firm careers.<sup>90</sup>) Complying with the policy, law schools began to exclude military recruiters because the ban on homosexuals in the military prevented the recruiters from signing the required nondiscrimination statement.<sup>91</sup> Despite this, the *FAIR* plaintiffs contend that law schools’ career services offices continued to cooperate with military recruiters outside of the on-campus recruiting

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presence of openly gay soldiers would have a negative impact on unit cohesion, morale, or discipline. I can think of many good reasons, however, why Congress, rather than law professors, makes such decisions.

<sup>88</sup> Brief for Appellants at 6, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) [hereinafter Third Circuit Brief for Appellants], available at <http://www.law.georgetown.edu/solomon/documents/CA3Brief.pdf> (last visited August 6, 2005).

<sup>89</sup> Plaintiffs’ Trial Brief, *supra* note 70, at 6.

<sup>90</sup> See, e.g., Tina Gutierrez, *Designing a Better Recruiting System: A Fantasy*, 12 No. 7 LAW. HIRING & TRAINING REP. 2 (1992).

In 1990 the employment situation in the legal profession switched from a seller’s market to a buyer’s market — literally overnight. . . . Law school placement offices found on-campus recruiting down 10 to 30 percent in 1990 and again in 1991. Employers outside major metropolitan areas were suddenly attractive to law students from East Coast law schools. Public interest and government employers were also challenged to choose those few they could hire from among many highly attractive candidates — often for little or no pay.

*Id.* at 2.

<sup>91</sup> Third Circuit Brief for Appellants, *supra* note 88, at 6.

programs and the military successfully recruited students despite being barred from on-campus recruiting.<sup>92</sup>

Beginning in 1994, however, amendments to the Department of Defense appropriation bills required the withholding of Defense Department funding from any educational institution which prevented access by military recruiters to its campus.<sup>93</sup> In 1996, Congress expanded the scope of the funds involved, adding funds from the Departments of Education, Health and Human Services, Labor, and Transportation to those from the Department of Defense.<sup>94</sup> In the fall of 2001, the Defense Department began a more stringent enforcement effort, demanding a higher degree of compliance than it had in the past.<sup>95</sup> In particular, the Defense Department now aggressively seeks to make clear to universities that noncompliance by any administrative unit of the university risks the federal funding for the entire university, not just the subunit.<sup>96</sup> Congress codified this more stringent approach in the 2004 version of the Solomon Amendment.<sup>97</sup>

This account reveals a critical feature: that Congress steadily increased the pressure on universities to provide equal access for military recruiters by first expanding the sources of funding at risk and then expanding the scope of the risk to the entire university for each subunit's behavior. One reason for this progression is that law schools generally receive little or no funding from the Defense Department and

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<sup>92</sup> *Id.* at 10–11. FAIR seems to want to have it both ways: it argues that exclusion from on-campus interviewing serves a vital educational purpose even though the military is still able to recruit effectively. *Id.* It almost suggests that FAIR's interest is in being seen to be noncooperative with an employer unpopular with some students and faculty, without actually doing anything that restricts the employer from hiring the students FAIR is educating. Almost.

<sup>93</sup> National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

<sup>94</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009 (1996).

<sup>95</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 227 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005). Candor and pride both require that I note that I may have played a small role in increasing the stringency of the enforcement efforts. On November 12, 2001, I published an op-ed piece in the *Wall Street Journal* that criticized the Society of American Law Teachers, a left-wing faculty group that is also a plaintiff in the *FAIR v. Rumsfeld* litigation, for its letter to deans reminding law schools of their duty to mitigate the presence of the military and calling on law faculties not to allow the reaction to 9/11 to reduce efforts to discourage the military's policy prohibiting membership to openly homosexual service men and women. Andrew P. Morriss, *Law Profs Throw SALT on 9/11 Wounds*, WALL ST. J., Nov. 12, 2001, at A22. The overwhelmingly positive response I received, which included numerous promises to contact Congressional representatives and Executive Branch officials, makes me hopeful that the piece helped create support for a more aggressive approach to enforcing the statute.

<sup>96</sup> Third Circuit Brief for Appellants, *supra* note 88, at 9–10, 11–13.

<sup>97</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911–12 (2004).

relatively little from other direct federal sources, at least by comparison to medical and engineering schools. This makes the cost of sanctions applied only to law schools relatively low.

Contrary to the characterization of the current version of the Solomon Amendment by the *FAIR* plaintiffs as an overbroad restraint,<sup>98</sup> this gradual ratcheting up of pressure on universities is indicative of a narrowly tailored approach by Congress: after attempts to achieve its objectives through less restrictive means failed, Congress gradually experimented with broader approaches until it found the right combination of funding sources and funding destinations to achieve its purpose.<sup>99</sup>

The structure of the access required by Congress is also relevant. Congress required only that law schools that provide some employers services do so on an equal basis for military recruiters.<sup>100</sup> (Congress also provided an exemption for schools with a tradition of pacifist beliefs.<sup>101</sup>) Law schools are under no obligation to provide any employer with access. The general analogy is Title IX, which requires parity between men and women's sports if sports programs are offered, but does not require that sports programs be provided.<sup>102</sup>

<sup>98</sup> Second Amended Complaint, *supra* note 9, ¶ 54.

<sup>99</sup> The other potentially important feature of the Congressional debates is that during debate over the different versions of the Solomon Amendment, various supporters argued in favor of the legislation to, as the Third Circuit summarized,

“[S]end a message over the wall of the ivory tower of higher education” that colleges’ and universities’ “starry-eyed idealism comes with a price. If they are too good — or too righteous — to treat our Nation’s military with the respect it deserves[,] then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America.”

*FAIR*, 390 F.3d at 226 (alteration in original) (quoting Rep. Richard Pombo). Other supporters made other arguments for the legislation, including linking it to military preparedness, *id.* at 225 (quoting Rep. Solomon), but at least some supporters made explicit arguments that the law would send a message to universities, a fact about which the Third Circuit and the plaintiffs express considerable concern. *Id.* at 225–26; *see also* Third Circuit Brief for Appellants, *supra* note 88, at 7–8. Because the arguments against the plaintiffs are so strong, I do not believe these statements have an impact on the result.

<sup>100</sup> 10 U.S.C.S. § 983(b) (2003).

<sup>101</sup> *Id.* § 983(c).

<sup>102</sup> *See generally* Eric Bentley, *Title IX: The Technical Knockout for Men’s Non-Revenue Sports*, 33 J.L. & EDUC. 139 (2004) (explaining operation of Title IX); *see also* 20 U.S.C.S. § 1681(a) (1997) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”); 34 C.F.R. § 106.41(a) (2004).

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall



Further, a key comparison between the facts in *FAIR v. Rumsfeld* and the facts of many of the recent cases involving associational freedom is the impact of the statute at issue. In most of the recent associational freedom cases, discussed in detail below, the statutes at issue were antidiscrimination ordinances forbidding the organizations in question from denying access to their facilities and/or membership to protected classes.<sup>103</sup> At least in theory, therefore, the antidiscrimination statutes that infringed on various organizations' associational freedom were based on legislative determinations that certain distinctions among individuals were impermissible. For example, statutes denying Rotary Clubs and Jaycees chapters the ability to exclude women from membership increased opportunities for women.<sup>104</sup> The associations' freedom to determine their membership was thus a casualty of state efforts to *expand*

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provide any such athletics separately on such basis.

*Id.* The parallels between Title IX and the Solomon Amendment are extensive. Like the Solomon Amendment, Title IX affects universities as a whole, not simply athletic programs. The Supreme Court originally restricted its application to individual programs, rather than entire universities. *See* *Grove City Coll. v. Bell*, 465 U.S. 555 (1984). The impact of this on athletic programs was large. "Because few athletic departments are direct recipients of federal funds — most federal money for universities is channelled through financial aid offices or invested directly in research grants — *Grove City* cabined Title IX and placed virtually all collegiate athletic programs beyond its reach." *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993), *cert. denied*, 520 U.S. 1186 (1997). The Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988), amended the statute to apply to all parts of university programs: "For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education; or . . . a local educational agency . . . system of vocational education, or other school system . . ." As the First Circuit summarized, "[t]he Restoration Act required that if any arm of an educational institution received federal funds, the institution as a whole must comply with Title IX's provisions." *Cohen*, 991 F.2d at 894. Thus like the Solomon Amendment, Title IX uses the leverage of all federal funding to require compliance in a specific program area unrelated to the federal funding.

<sup>103</sup> For example, Professors Chemerinsky and Fisk argue (in their article criticizing *Boy Scouts of America v. Dale*) that

[e]nding discrimination by organizations like the Jaycees, the Rotary Club, and the Boy Scouts — the entities involved in the leading Supreme Court cases — serves many compelling purposes. Such associations provide benefits to their members, ranging from training, to business contacts, to the opportunity for school children to have fun and learn life skills. All in society should have access to these benefits. Indeed, ending discrimination advances freedom of association: it allows those excluded to associate with the group and its members.

Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 615 (2001) (citation omitted). A similar argument applies to expanding access to law school placement offices.

<sup>104</sup> *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

opportunities. Similarly, the Solomon Amendment conditions universities' receipt of certain federal funds on their compliance with statutory conditions allowing military recruiters equal access to the universities' career services offices.<sup>105</sup> Although FAIR casts its claim in terms of *its members'* desire to expand opportunities in the military for homosexuals,<sup>106</sup> the immediate effect of the law schools' policy is to *restrict* access for *law students* to interview for job opportunities in the military.<sup>107</sup> It is the Solomon Amendment, by contrast, which is expanding opportunities for *students*, by increasing the number of employers interviewing on campus.<sup>108</sup> The Solomon Amendment is thus most accurately seen as a parallel to Title VII in terms of its impact.<sup>109</sup> As I will discuss below, I believe this matters for assessment of the interests of both the law schools and the government.

## II. EXPRESSIVE ASSOCIATION

The heart of the plaintiffs' claim in *FAIR v. Rumsfeld* is that the Solomon Amendment burdens their constitutional right to expressive association.<sup>110</sup> There are three elements to expressive association claims: "(1) whether the group is an 'expressive association,' (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association."<sup>111</sup>

### A. What Is an Expressive Association?

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<sup>105</sup> 10 U.S.C. § 983(b) (2003).

<sup>106</sup> Second Amended Complaint, *supra* note 9, ¶¶ 7, 20.

<sup>107</sup> The degree to which the restrictions imposed by the law schools actually restricted the students' access to military jobs varied from school to school and certainly did not prevent a determined student from finding out about JAG Corps opportunities. That, however, is not the issue. The restrictions clearly disadvantaged the military recruiters to some degree and harmed the military's recruitment efforts. The *FAIR* plaintiffs' attempt to argue that their restrictions were ineffective is thus misplaced. *See supra* note 92.

<sup>108</sup> I do not contend that the government has free reign to expand other people's opportunities into my space, associational or physical; merely, this is what it appears the courts think the government is doing when they embrace strong non-discrimination principles. Indeed, one participant at the SEALS conference suggested, perhaps not entirely in jest, that the government could always simply seize interview rooms under eminent domain. *See Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

<sup>109</sup> *See Roberts*, 468 U.S. at 624 (characterizing antidiscrimination laws as providing "equal access to publicly available goods and services").

<sup>110</sup> Reply Brief for Appellants, *supra* note 67, at 16.

<sup>111</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004) (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–58 (2000)).

The Third Circuit majority dealt quickly with the first element, finding that the law schools were expressive associations.<sup>112</sup> The panel's complete analysis of this element was:

A group that engages in some form of public or private expression above a *de minimus* threshold is an "expressive association." The group need not be an advocacy group or exist primarily for the purpose of expression. The Supreme Court held that the Boy Scouts, which "seeks to transmit . . . a system of values, engages in expressive activity."

"By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." Because FAIR has shown that the law schools "possess[] clear educational philosophies, missions and goals," we agree with the District Court's conclusion that they qualify as expressive associations. Therefore, FAIR satisfies the first element of the *Dale* analysis.<sup>113</sup>

The District Court's analysis, although slightly longer, was similar in content and tone.<sup>114</sup> The lower courts did not properly analyze this element, however, and law schools are not expressive associations.<sup>115</sup>

One indication that the lower courts paid insufficient attention to this element is their failure to consider state law schools as members of FAIR. These schools, as instrumentalities of state governments, have no First Amendment rights.<sup>116</sup> (As

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<sup>112</sup> *Id.* at 231.

<sup>113</sup> *Id.* (citations omitted).

<sup>114</sup> *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 303–04 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

<sup>115</sup> In commenting on *Dale*, Professor Epstein noted:

The right outcome in this case should not depend on a delicate balance of what kinds of organizations count as expressive organizations under the First Amendment. Rather, any proper decision must recognize that the state has no interest in counteracting discrimination by private associations that do not possess monopoly power.

Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000). He is right as a matter of what the Court *ought* to say that the Constitution means. The argument here is within the context of what the Court *has* said the Constitution means. I would certainly make different arguments to "Justice" Epstein than I would to the current Court. Similarly, Professor Hills has offered a persuasive alternative to the current expressive association jurisprudence. See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 219–29 (2003). It is an alternative, however, and this Article is concerned with applying the current law rather than altering it.

<sup>116</sup> Amicus Brief of Law Professors and Law Students, *supra* note 5.

discussed below, there is a parallel argument that the law schools' associational rights are not burdened by the requirement of equal access as a condition of receiving federal funds.)

### 1. The Courts' Expressional Association Jurisprudence

The current touchstone for expressive association claims is the Supreme Court's decision in *Boy Scouts of America v. Dale*.<sup>117</sup> In that case, the Court determined that the Boy Scouts of America (a non-profit corporation) and the Monmouth Council of the Boy Scouts (a separate non-profit corporation) were expressive associations.<sup>118</sup> The Court noted that the two organizations (which it did not distinguish) were private organizations, had a clear mission of instilling values in young people, and communicated those values by having their adult members both expressly state the organizations' values and implicitly convey them through their association.<sup>119</sup> This evidence was sufficient for the majority of the Court to conclude that the Boy Scouts of America and, implicitly, the Monmouth Council, were expressive associations.<sup>120</sup>

*Dale* does not tell us a great deal about what an expressive association is, and a Third Circuit panel accurately characterized *Dale*'s discussion of this point as "very succinct."<sup>121</sup> Moreover, *Dale* was not a unanimous opinion but a 5–4 decision

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<sup>117</sup> 530 U.S. 640 (2000). FAIR's dependence on *Dale* is ironic, given that case's holding that the Boy Scouts may exclude openly homosexual adult members.

<sup>118</sup> *Id.* at 644. The Supreme Court opinion is vague about the council, saying it is a "division of the Boy Scouts of America." *Id.* See generally Monmouth Council (NJ) B.S.A., <http://www.monmouthbsa.org/index.html> (last visited Sept. 13, 2005).

<sup>119</sup> *Id.* at 649–50.

<sup>120</sup> *Id.* at 656. There are problems with the Court's quick conclusion, as Professor Hills notes.

*Dale* notes that the BSA's mission is to instill values in children: "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." But this assertion cannot be as "indisputable" as the Court argues, given that the Court itself implicitly disputed it in *Runyon v. McCrary* when it held that a racist private school had no First Amendment entitlement to exclude black children from its student body. Undoubtedly, [the schools in that case] sought to transmit (racist) values. *Runyon*, however, perfunctorily rejected their First Amendment claim by relying on the lower court's determination that "there is no showing that discontinuance of the discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."

Hills, *supra* note 115, at 215 (citations omitted).

<sup>121</sup> *Pi Lambda Phi Fraternity v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000). Professor Epstein accurately summarizes the problem: "One clear caution sign is that the line between expressive and nonexpressive organizations does not leap out." Epstein, *supra* note 115, at 139.

— a margin of “disturbing closeness”<sup>122</sup> in a case concerning “an issue so close to the core of the First Amendment.”<sup>123</sup> *Dale* is thus limited in its usefulness on this point both because it is too succinct to produce much guidance and because only five members of the Court (including one who has announced her departure and another who recently passed away) subscribed to its analysis.<sup>124</sup>

*Dale* does not stand alone, however. Expressive association claims are at the heart of several other Supreme Court opinions. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,<sup>125</sup> the Court unanimously rejected a claim by a group of “gay, lesbian, and bisexual descendants of [] Irish immigrants”<sup>126</sup> that Massachusetts’ antidiscrimination statute compelled the South Boston Allied War Veterans Council, “an unincorporated association of individuals elected from various veterans groups,”<sup>127</sup> which organized an annual St. Patrick’s Day–Evacuation Day<sup>128</sup> parade in Boston, to allow the gay pride group to march in the parade behind a banner proclaiming its organization’s name.<sup>129</sup> Unfortunately, *Hurley* also does not tell us much about what constitutes an expressive association because it concerned the organization of a parade. The Court found that parades are “a form of expression, not just motion”<sup>130</sup> and so “[n]ot many marches . . . are beyond the realm of

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<sup>122</sup> Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1934 (2001).

<sup>123</sup> *Id.* at 1939.

<sup>124</sup> Professor Richard Epstein makes a devastating critique of the whole idea of distinguishing among groups on this basis:

The short, unhappy truth is that the phrase “expressive association” does not function well as a term of exclusion. Quite simply, it cannot bear the weight that is thrown onto its fragile shoulders. It is not the byproduct of any general theory. It came into use, purely and simply, on the ground that the associational right is derived from the free speech right, and from the free speech right alone.

Epstein, *supra* note 115, at 140.

Professor McGinnis makes a thoughtful case that *Dale* is part of “a coherent jurisprudence that invigorates decentralization and the private ordering of social norms that Alexis De Tocqueville celebrated in *Democracy in America* as being the essence of the social order generated by our original Constitution.” John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 487 (2002).

<sup>125</sup> 515 U.S. 557 (1995).

<sup>126</sup> *Id.* at 561.

<sup>127</sup> *Id.* at 557. The group was led by the delightfully nicknamed “John J. ‘Wacko’ Hurley,” whose nickname unfortunately does not appear as part of the formal caption of the case. See *id.* at 561. In my opinion, this was a major tactical error by the plaintiffs in captioning their lawsuit. The publicity, if not the outcome, would have been far more favorable if the suit had been captioned ‘*Wacko’ Hurley, et. al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston.*

<sup>128</sup> Evacuation Day is a Massachusetts state holiday celebrating the departure of the British Army and Loyalist civilians from Boston in 1776. *Id.* at 560.

<sup>129</sup> *Id.* at 557.

<sup>130</sup> *Id.* at 568.

expressive parades.”<sup>131</sup> Since parades are inherently expressive, the Court held that although the St. Patrick’s Day–Evacuation Day Parade itself had no clear message,<sup>132</sup> the parade organizer was entitled to act “like a composer” and select “the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”<sup>133</sup> It seems, therefore, that there are some activities, like parades, whose nature is inherently so expressive that any association organizing the activity must be an expressive association. As a result, however, “[t]o use a parade as a model for analyzing the expressive aspects of association is to mistake the extraordinary case for the average.”<sup>134</sup>

In addition to *Hurley* and *Dale*, we also have the benefit of the Supreme Court’s opinion in *Roberts v. United States Jaycees*,<sup>135</sup> a 1984 case that upheld the application of Minnesota’s antidiscrimination statute to the Jaycees and forced them to allow the admission of women as full members. Unlike the associations involved in *Dale* and *Hurley*, the Jaycees lost their claim for associational freedom, potentially teaching us something about the nature of the claim by comparison with the successful claims in the later cases.

The Court acknowledged the high stakes in *Roberts*, observing “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”<sup>136</sup> The Jaycees lost nonetheless. The Court’s analysis of the Jaycees’ interests is not as clearly delineated as the *Dale* majority’s analysis of the Boy Scout’s interests; the Court mingles discussion of the extent of the impact of admitting women on the Jaycees’ message with its discussion of the content of the Jaycees’ associational freedom claim.<sup>137</sup> The Court did note, however, that “a ‘not insubstantial part’ of the Jaycees’ activities constitutes protected expression on po-

<sup>131</sup> *Id.* at 569. Indeed, the Court noted that “the inherent expressiveness of marching to make a point explains our cases involving protest marches.” *Id.* at 568.

<sup>132</sup> *Id.* at 557.

<sup>133</sup> *Id.* at 574. The Court acknowledged that “this view [may give] the Council credit for a more considered judgment than it actively made . . .” *Id.*

<sup>134</sup> David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 163–64 (2001) (citation omitted).

<sup>135</sup> 468 U.S. 609 (1984).

<sup>136</sup> *Id.* at 623.

<sup>137</sup> *Id.* at 626–27. *Roberts* is also read as distinguishing a commercial context (the Court suggested that the Jaycees’ main purpose was networking) from other First Amendment values. See Paulsen, *supra* note 122, at 1925:

The opinion can be read, without much straining, as limited to commercial contexts where a private organization cannot plausibly point to any serious, nonpretextual expressive interests that would be impaired by the government action in question; the result might not extend to clubs that make out a stronger claim of some genuine expressive motivation.

litical, economic, cultural, and social affairs.”<sup>138</sup> Thus, while the Jaycees may have lost when the Court balanced their interests against Minnesota’s, there is little doubt that an organization with substantial activities of expression on political affairs qualifies as an expressive association, whatever its other activities may be. The Supreme Court’s expressive association cases are thus of little direct guidance on the question of what constitutes an expressive association largely because that issue has not yet arisen in a case before the Court.<sup>139</sup>

Fortunately, we have some additional evidence from lower court opinions about what constitutes an expressive association. In *The Circle School v. Pappert*, the Third Circuit held that a Pennsylvania statute requiring all schools, public and private, to conduct daily recitations of the Pledge of Allegiance and singings of the national anthem violated the First Amendment right to expressive associations of private schools.<sup>140</sup>

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<sup>138</sup> *Roberts*, 468 U.S. at 626.

<sup>139</sup> We could read *Dale* and *Hurley* as qualifying *Roberts*, but this does not help the plaintiffs. See McGowan, *supra* note 134, at 168–69 (giving such a reading). Read together, the three opinions suggest that expressive associations have the right to exclude only insofar as it is related to the expressive aspect of their association. Thus, the Jaycees were not allowed to exclude women because the Court determined the exclusion was unrelated to their expression. In contrast, the connection between expression and association was more direct in *Dale*. A Scout leader *qua* Scout leader expresses Scout values in a way that a member of the Jaycees *qua* member of the Jaycees does not express the Jaycees’ values. (The Jaycees obviously disagreed with the Court’s conclusion on this point.) It is difficult to see how a military recruiter expresses the values of the law schools at which she interviews students. Even read in this fashion, therefore, these cases put the facts far closer to *Roberts* than to *Dale* and *Hurley*.

<sup>140</sup> 381 F.3d 172 (3d Cir. 2004). Mr. Hurley may yet have a further impact on the law. See Adam Reilly, *Talking Politics: Romney laughs off gay marriage*, BOSTON PHOENIX, Mar. 26, 2004, at 7, available at [http://www.bostonphoenix.com/boston/news\\_features/this\\_just\\_in/documents/03702264.asp](http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/03702264.asp) (last visited July 9, 2005) (quoting Massachusetts governor and possible 2008 Republican candidate for president Mitt Romney as joking at a St. Patrick’s Day Breakfast, “There’s nothing wrong with our supreme court in Massachusetts that having Wacko Hurley as chief justice wouldn’t cure!”). Despite quasi-diligent (e.g., Google) efforts, I was unable to uncover the origin of Mr. Hurley’s nickname.

The schools' missions included providing students with "freedom of choices."<sup>141</sup> The challenged statute interfered with the students' choices about whether to say the Pledge or sing the national anthem and thus with the schools' mission. To so find, the court used language later relied upon heavily by the plaintiffs in *FAIR v. Rumsfeld*: "By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students."<sup>142</sup> Potentially, at least, "educational institutions" might be as inherently expressive as parades, although the court did not explain why this might be so. This language, however, did not provide a blanket determination that educational institutions are expressive associations per se, as can be seen by the subsequent sentence: "Each school plaintiff has shown that it possesses clear educational philosophies, missions and goals."<sup>143</sup> The *Circle School* decision thus teaches that the educational context is one where expression may occur but, unfortunately, yields little guidance about exactly when expressional associations exist.

In *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*,<sup>144</sup> a different panel of the same court held that a fraternity was not an expressive association under *Dale*. The fraternity chapter sued the university over disciplinary actions taken by the university against the chapter.<sup>145</sup> In rejecting the fraternity chapter's claim, the court stated:

[A]n organization must do more than simply claim to be an expressive association in order to receive the benefits of constitutional protection. The Chapter's contentions along these lines, along with its meager showing of a few minor acts of community

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<sup>141</sup> *Circle School*, 381 F.3d at 182. Specifically, the court noted:

The Circle School's public mission statement includes the following: "[w]e believe in the wisdom of each person to know what's best for him or her," that "freedom to entertain ideas must be unbounded," and that "the child person is encouraged to explore widely . . . physically, intellectually, emotionally, socially, and spiritually" so that s/he may "grow[ ] in skills of perception and judgment." Project Learn, similarly, states that "the educational program must provide the opportunity for children to share in the planning and directing of the learning experience," and "[t]he final choice must always be the child's to participate in an activity or not . . . the teacher's responsibility is to help the child to see clearly the choices available and the possible consequences of particular choices."

*Id.* (citations omitted).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> 229 F.3d 435 (3d Cir. 2000).

<sup>145</sup> The university stripped the organization of its "recognized student organization" status after several members were arrested on drug charges during a raid on the chapter's house. *Id.* at 438.



service, are insufficient to meet the minimum requirements for an expressive association.<sup>146</sup>

If we look at these five examples, we can make some tentative conclusions about what constitutes an expressive association. These types of examples are all we have because the courts have not laid out a full-fledged associational freedom doctrine.<sup>147</sup> The Boy Scouts, the South Boston Allied War Veterans Council, and the two schools discussed in the *Circle School* opinion are clearly expressive associations. The Jaycees, despite losing on the merits, are also an expressive association, even in the absence of an explicit statement by the Court to that effect. Indeed, the Jaycees had perhaps the strongest claim to being an expressive association because they are engaged in substantial amounts of protected expression on political issues. The Pi Lambda Phi chapter is not an expressive association. The line between an expressive association and an association that does not qualify for protection thus lies somewhere between the Pi Lambda Phi chapter and the other organizations.<sup>148</sup>

The *Pi Lambda Phi* court thought there was relatively little on the unprotected side of this line. "The expansive notions of expressive association used in *Roberts* and *Dale* demonstrate that there is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity."<sup>149</sup> However, even the *de minimis* threshold that the court discerned in *Roberts* and *Dale* could not be met by the fraternity chapter. The organization could only point to a sparse record of community service that the court characterized as not having "more than a mere[] incidental relationship to the group's character" and unsupported claims of espousing the ideals of the parent international organization.<sup>150</sup> *Pi Lambda Phi* suggests that the courts (or at least the Third Circuit) are willing to take a reasonably close look when evaluating an organization's claim to be an expressive association and whether rhetoric matches

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<sup>146</sup> *Id.* at 444.

<sup>147</sup> Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1498 (2001) ("So far, the Court has given us a series of examples without any defining principle."); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 680 (2002) ("As the doctrine of freedom of association has developed the examples are all the rules we have.").

<sup>148</sup> Assuming, of course, that the Third Circuit is a reliable guide.

<sup>149</sup> *Pi Lambda Phi*, 229 F.3d at 443.

<sup>150</sup> *Id.* at 444.

reality.<sup>151</sup> At last we have an example of an organization that is *not* an expressive association.

There appears to be little doubt that the Boy Scouts, the Jaycees, and even the South Boston Allied War Veterans Council (about which we know only that it organizes the parade) all engage in more substantial and effective association for the purpose of expression because they all do a great deal more expressing than does Pi Lambda Phi's unfortunate Pittsburgh chapter. Just exactly what the Boy Scouts and the veterans (who "compose" the parade) are expressing may be a bit muddled and unclear,<sup>152</sup> but they (and the more coherent Jaycees, who take explicit positions on issues) do express themselves explicitly and implicitly on a regular basis. The two schools in the *Circle School* case also have a clear expressive goal that is tied to regular action: educating children by letting children make their own choices; at least that is how the court understands it.

What distinguishes the Pi Lambda Phi chapter from these other organizations? It has ideals that apparently involve charitable works and a view of good citizenship, just as the Boy Scouts and the Jaycees do. The main factual difference appears to be that the fraternity chapter was not as effective at implementing its views as the Boy Scouts and the Jaycees, since the chapter did not produce a record of substantial charitable works. This cannot be the basis for the legal distinction; it would be inappropriate for the courts to measure the value of expression by organizations' effectiveness.<sup>153</sup> Hypocrites have free speech rights too,<sup>154</sup> in the marketplace of

<sup>151</sup> Some commentators suggest that the Supreme Court did not do so in *Dale*. See McGowan, *supra* note 134, at 123.

If the Court had scrutinized the evidence of the Scouts' expressive activity as it did with the Jaycees and the Rotary, the record suggested that the Scouts (as a national organization apart from the local sponsors who actually instruct the boys), do not have common beliefs or teachings about homosexuality. Under previous interpretations of the right of expressive association, the lack of such common beliefs and the lack of any express teachings about homosexuality would undercut the Scouts' claim.

*Id.*

<sup>152</sup> Professor Hills suggests there are good reasons for this lack of clarity. See Hills, *supra* note 115, at 210–14.

<sup>153</sup> See *id.* at 207 ("[J]udicial efforts to psychoanalyze associations are misguided because they miss the institutional complexity of associations' representation of their members. Institutions are not only amplifiers of their members' beliefs but also fora for members' internal debate.").

<sup>154</sup> It is a good thing for FAIR that this is true. There is no evidence that law schools generally engage in anything more than lip service to their policies, failing to publicly monitor firms that provide inhospitable environments for gays, lesbians, bisexuals, women, or racial, ethnic, or religious minorities. There is little evidence that efforts to end discrimination in the legal profession have succeeded, according to research by law professors themselves. See, e.g., David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black*

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*Lawyers in the Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 613–14 (1996) (“The fact that the country’s most prestigious law firms are nearly as segregated today as the entire legal system was forty years ago stands as a constant rebuke to the profession’s attempt to claim the noble side of [the heritage of *Brown v. Board of Education*].”). Further, there is widespread evidence that there are firms that are less than hospitable to minorities, gays, and women. See, e.g., Cindy Collins, *Scandals Rock Firms, But Recruiting Efforts Stay on Track*, 14 NO. 11 LAW, HIRING & TRAINING REP. 1 (1994) (reporting on various charges of discrimination against law firms). Astoundingly, the AALS’s response to these incidents was that law schools had great discretion in applying the antidiscrimination policy. *Id.* at 11. Even more shocking, in light of the great weight law schools claim to put on such policies, was the response of the schools:

Placement officials generally prefer to let students make their own decisions about whether or not to interview with controversial firms, based on such factors as how a firm is responding to a crisis, its past record, and whether a problem is perceived as belonging to a particular office or the firm as a whole. Lujuana Treadwell, assistant dean at the University of California at Berkeley’s Boalt Hall, says her office provides information from the National Association for Law Placement (NALP) and other material that the firm supplies. “Our role is to make information available to students.” They can then do research and decide on their own, she says. Treadwell is not aware that any student has raised questions about the current Baker & McKenzie situation.

*Id.* at 11–12.

Moreover, there are a number of steps firms could take to make themselves more hospitable to minority and female associates. See, e.g., Bobbi Bernstein, *When Good Intentions Aren’t Enough: Observations of an Openly Gay Law Firm Applicant*, 6 LAW & SEXUALITY 127, 133–37 (1996) (comparing some firms’ reluctance to address gay issues to the “don’t ask, don’t tell” policy and recommending affirmative steps to counter such reluctance); Eyana J. Smith, Comment, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789, 810–14 (2004). Law faculties do not appear willing to require participants in their career services offices (CSO) to take affirmative steps to improve the status of women and minorities, as they do not require employers to agree to such measures as a condition of using the CSO.

Law schools not only do not exclude Congressional employers, the source of the policy regarding gays in the military to which they object, but some law schools are reportedly engaged in efforts to create a new “Congressional clerkship” program to increase job opportunities for their graduates with the same institution that mandated both the military’s discriminatory policy and the Solomon Amendment. One might almost conclude that law faculties object to the military rather than to the policy based on these examples. Even worse, there are important questions raised in legal scholarship about how welcoming law schools are to gay, lesbian, and bisexual students. See, e.g., Janice L. Austen, et. al., *Results from a Survey: Gay, Lesbian, and Bisexual Students’ Attitudes About Law School*, 48 J. LEGAL EDUC. 157, 164 (1998) (“[T]he overall law school climate remains on the chilly side for many GLB students.”). One example cited in the above survey was the failure of many trusts and estates classes to deal with issues relevant to homosexuals. *Id.* at 164.

Further, law faculties seem to be doing something in their teaching that motivates students to drift away from public interest work. Citing fourteen studies, for example, a 1996

ideas, comparing actions to words is an effective means of evaluating the merits of organizations' and individuals' expressions. Moreover, given the extremely vague notions of expression connected with the South Boston Allied Veterans Council's organization of the parade,<sup>155</sup> it is hard to see the Pi Lambda Phi chapter's expressions

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article in *Law & Society* noted that "[c]ommentaries and empirical studies over the past several decades have consistently suggested that while a substantial proportion of incoming law students are interested in careers in 'public interest law,' that interest wanes significantly during law school." Howard S. Erlanger, Charles R. Epp, Mia Cahill, & Kathleen M. Haines, Research Note, *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC'Y REV. 851, 851 (1996). The study found similar evidence in an in-depth look at the University of Wisconsin law school's 1976 graduating class. *Id.* at 852-54. See also William Prewitt Kravolec, *Contemporary Legal Education: A Critique and Proposal for Reform*, 32 WILLAMETTE L. REV. 577, 580-81 (1996) ("A further serious defect with conventional legal education is its tendency to undermine moral integrity. . . . [F]requently the only moral concerns explored in the classroom are those of the professor."). Similarly, a feminist critique of law school's impact on the choice of public service, argued that:

[A]ccounts of women's experience at law school suggest that women feel its demoralizing effects most keenly. They participate less in class, because they are less comfortable in law school. In particular, they are less comfortable with the Socratic method, especially the argumentative polarized nature of discussion encouraged in many classrooms. Women also perceive that they receive less professorial attention in and out of class and less peer acceptance of their views. Women students frequently report that their participation is met with scorn and hostility. They are also more isolated from the content of legal education as they are unhappy with the unemotional, detached nature of legal analysis. Lani Guinier's study reports that "laced throughout the interviews with both white women and, to a greater degree, women of color, we hear the desire to reinsert culture, race, politics and 'emotion' back into legal interpretation."

Adrienne Stone, *The Public Interest and the Power of the Feminist Critique of Law School: Women's Empowerment of Legal Education and Its Implications for the Fate of Public Interest Commitment*, 5 AM. U. J. GENDER & L. 525, 543 (1997) (citations omitted). The point of noting these critiques is not that they are necessarily correct, but that law faculties seem to ignore internal critiques of their own behavior and the behavior of law firms that is based on the same sorts of evidence and analysis that leads them to disapprove of the military recruiter's presence. Yet, they seem to do nothing about it. The one constant to such analyses is that they are a regular feature of the legal literature. See Maya Alexandri, Note, *The Student Summer Associate Experience With Harassing Behaviors: An Empirical Study and Proposal for Private Party Action*, 19 WOMEN'S RTS. L. REP. 43, 43 (1997) ("Sexual harassment in law firms and law schools is a frequent topic of legal scholarship."). Alexandri reports that a Westlaw search run in November 1996 (Sex! /s Harass! & law /2 firm law /2 school) generated 2,514 articles. *Id.* at n.1. I reran the same search on August 5, 2005 and got 8,579 articles.

<sup>155</sup> The best the Court could come up with was a suggestion that "[t]he parade's organizers may not believe these facts [i.e., those hypothesized by the Court as the message of the gay rights group] about Irish sexuality, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the

as substantially less expressive in intent. The close look at the connection between rhetoric and reality thus seems misplaced.

A better distinction of *Pi Lambda Phi* is to look at what the associations in the cases were claiming the right to do. The Boy Scouts, the Jaycees, and the South Boston veterans were arguing that they should be allowed to engage in core associational activities: choosing leaders, choosing members, and choosing messages for their public presentations. In *Circle School*, the schools objected to being told how to conduct their classrooms. On the other hand, the fraternity in *Pi Lambda Phi* tried to force a different association (the University of Pittsburgh) to refrain from exercising *its* own associational freedom not to associate with the chapter. Unfortunately for the *FAIR* plaintiffs, they sit in a position more analogous to the fraternity chapter than to the others because the *FAIR* plaintiffs seek to limit the associational freedom of their students who wish to associate with military recruiters.

A cynical, or perhaps realist, interpretation of the differences in the results might rest on the higher status of the Boy Scouts, the Jaycees, the schools, and possibly even the South Boston Allied War Veterans Council,<sup>156</sup> compared to fraternity boys. Such an analysis echoes some of the academic criticism of the associational freedom cases. Professor Mazzone, for example, argues that “[i]n the Court’s approach, association is simply a noun: associations are entities that speak.”<sup>157</sup> In short,

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parade.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574–75 (1995).

<sup>156</sup> News accounts raise some questions about the Council. *See, e.g.*, Reilly, *supra* note 140.

In 1992, smoke bombs and beer cans were thrown at some of the gay marchers as bystanders shouted, “You bunch of fags, get out of Southie” and “I hope you all die of AIDS, homos.” In 1993, when Hurley promised to continue the legal fight (“We’ll go on until we have a parade of a family nature,” he vowed), gay marchers were spat upon and pelted with snowballs as sharpshooters watched from rooftops.

*Id.*

<sup>157</sup> Mazzone, *supra* note 147, at 679. Mazzone also contends:

[T]he Court appears to have only a very superficial and detached understanding of what an association is. In speaking of associations, the Court fails to offer any coherent account of what it understands the term to encompass, and the most basic features of associations are missing from the Court’s discussion. The Court offers no recognition, for instance, of the number or types of associations in the United States, or the extent of citizen involvement in associational life. There is no apparent understanding of what associations do, why people join them, or what participation means to their members. The Court makes little attempt to consider the conditions associations require to exist and thrive or to understand the contributions or difficulties associations may represent in a constitutional democracy.

*Id.* There is a well-developed literature with conflicting views on exactly this point, and it may be that the Court would profit from considering the role associations play in democratic

perhaps the conclusion we should reach is that the Boy Scouts, a long-standing association with an impressive record of community service, has something to say; the drug-using fraternity boys do not (or, at least, nothing to say that they cannot say as well in a different fraternity that *is* recognized as an official student group).

We are left with the undeniable fact that the Supreme Court's *Dale*-based jurisprudence requires an ability to distinguish between expressive associations whose rights are protected and other associations whose rights are not.<sup>158</sup> As the description of the expressive association cases above suggests, neither the Supreme Court nor the lower courts have provided much guidance about how to distinguish one from the other. This lack of guidance is in part the result of the courts until now having been presented with quite easy cases on this point, and so the examples drawn from the cases leave significant gaps unfilled.

Moreover, the emphasis in these cases has been on the expressiveness of the association,<sup>159</sup> rather than on the associational nature of the expressiveness. The Boy Scouts, Jaycees, South Boston veterans, schools involved in the *Circle School* case, and even the unfortunate University of Pittsburgh chapter of Pi Lambda Phi are obviously all associations. These associations can tell us who is in the group and who is out — indeed, it was the attempt of individuals to acquire or retain insider status that caused all but the *Circle School* plaintiffs to bring their actions. Mr. Dale wanted to be a Boy Scout leader, women (through the state of Minnesota) wanted to be Jaycees, the members of GLIB wanted to be in the Boston parade as a group, and the members of Pi Lambda Phi wanted to be a “recognized student organization.” In each case, some entity told them they could not have the status they desired. Thus, there is no question that all of these cases involve associations and the issue of who gets to be in them. In *FAIR*, by contrast, the military does not want to be part of the law schools; it merely wants to talk to law students. Because the Third Circuit did not recognize the difference between these associations and the law schools and law faculties which belong to *FAIR*, it neglected to pay adequate attention to this element of their claim.

## 2. What Is an Association That Can Express Itself?

The critical question in *FAIR v. Rumsfeld*, unlike past Supreme Court cases involving expressive association claims, is: what exactly is the association which is to be freed from government interference? The plaintiffs assert associational free-

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societies in developing its expressive association jurisprudence. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); Hills, *supra* note 115. Thus far the Court has not considered these roles, however.

<sup>158</sup> See *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000); see also Hills, *supra* note 115, at 215.

<sup>159</sup> Professor Hills aptly terms this the “megaphone” theory of association in which the association serves merely to amplify the members’ views. Hills, *supra* note 115, at 206–07.

dom rights for law schools and law faculties.<sup>160</sup> Apparently, it is either the law faculty as a body or the law school as a collective entity, depending on the school.<sup>161</sup> (Evaluating FAIR's members' claims is complicated by FAIR's insistence on maintaining anonymity for most of its members based on its fear of retaliation by the government.<sup>162</sup>) In particular, the plaintiffs want the decisions of law faculties governing which employers have access to the law school placement offices to be recognized as an exercise of associational freedom.<sup>163</sup>

The proper first question in evaluating FAIR's claims is whether law schools or law faculties are "associations"?<sup>164</sup> If so, we can then reach the second question of whether they are "expressive" associations. The Third Circuit panel decision concentrated on the second question, focusing on the issue of expressiveness and neglecting the precursor question of associational status.<sup>165</sup>

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<sup>160</sup> Second Amended Complaint, *supra* note 9, ¶ 54. There are also individual faculty members and students who are named as plaintiffs. The claims of these plaintiffs, as individual members of the law schools or law faculties as associations, seem to me to stand or fall with the associational claims of the collectives to which they assert they belong.

<sup>161</sup> The Second Amended Complaint describes FAIR by stating:

[A]bout half the members of FAIR are law schools. The other half are law school faculties that have voted as a body — by at least majority vote — to join FAIR. The law school faculties that are members of FAIR are the bodies that collectively, and autonomously, make law school policy, including the decision whether and how to implement non-discrimination policies."

*Id.* ¶ 7. It is unclear what distinction is intended by the description of "about half" of FAIR's members as "law schools" and the other half as "law faculties." It may indicate something about the official position of the dean.

<sup>162</sup> *Id.* ¶ 7b.

<sup>163</sup> *Id.* ¶ 46.

<sup>164</sup> Professor Epstein argues that

[t]he fine-spun efforts to shoehorn freedom of association into some ill-defined expressive box will breed only pointless and arcane distinctions. What must be recognized is that freedom of association is "derivative" not only of speech, but also of liberty and property as ordinarily conceived. The upshot is that all private associations, regardless of their internal structure and stated purposes, should receive the same freedom afforded the Boy Scouts in this case.

Epstein, *supra* note 115, at 120. The question of whether law schools and faculties are associations lies before the "expressive box" question, however. Thus, while I agree with Epstein that the distinctions between expressive and non-expressive associations are difficult to justify, I do believe that there is a role for an inquiry into whether an association exists at all.

<sup>165</sup> See *FAIR v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004).

There may be some differences from law school to law school,<sup>166</sup> but the vast majority of American law schools are subunits of larger universities or colleges.<sup>167</sup> Universities with law schools are organized as not-for-profit corporations or other entities; a small number of universities are organized as for-profit corporations.<sup>168</sup> Within these not-for-profit universities, law schools exist as administratively designated subdivisions, just as medical schools, dental schools, colleges of arts and sciences, and so on, exist. Through the universities' bylaws and regulations, the boards which control universities delegate to these various administrative subdivisions the authority and responsibility necessary to carry out various tasks. For example, university subdivisions generally select new faculty members by interviewing and choosing among potential candidates.

Such delegations are not absolute, however, since the boards retain either the final, legal authority to act or the ability to revoke the authority to act. In the case of hiring new faculty, for example, a subdivision may determine to hire Mr. Smith, but the hiring is not final and the contract not completed until the university's board has ratified that decision. Thus, despite the FAIR-member law school faculties' assertion that they "collectively, and autonomously, make law school policy" for their respective law schools,<sup>169</sup> it is unlikely to be the case that any of them are in fact the legal entity responsible for setting such policies. (We could only know for sure if discovery were conducted on this point.) Their policy-making may be tolerated or even encouraged by their respective boards of regents, but it is not binding policy-making; they are but servants of the board.

As subdivisions of universities, the law schools and law faculties have no independent legal existence. Indeed, universities can and do dissolve and reorganize subordinate units from time to time.<sup>170</sup> Thus, unlike the Boy Scouts, the Jaycees, the South Boston veterans, the schools from *Circle School*, and even the poor University

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<sup>166</sup> I am drawing on my own knowledge of university structure, my university's bylaws, and conversations with numerous faculty and administrators at various colleges and universities around the United States. Because of the variability of the details, which are not relevant to my argument, I am not providing citations to multiple different sets of university bylaws or regulations.

<sup>167</sup> There are several "stand alone" law schools, such as New York Law School. Although not part of a university with separate departments, these law schools are subdivisions of an overall organization, control of which rests with the overall organization's board.

<sup>168</sup> E.g., University of Phoenix Online, <http://www.uopxonline.com>. See William Symonds, *University of Phoenix Online: Swift Rise*, BUS. WK. ONLINE, June 23, 2003, [http://www.businessweek.com/magazine/content/03\\_25/b3838628.htm](http://www.businessweek.com/magazine/content/03_25/b3838628.htm) (stating that the University of Phoenix Online's shares have "soared 557%, making it one of the best-performing tracking stocks ever and helping it reach the No. 17 spot in *BusinessWeek's* 2003 Info Tech 100 list").

<sup>169</sup> Second Amended Complaint, *supra* note 9, ¶ 7.

<sup>170</sup> At my own university, for example, the Department of Economics was transferred from the College of Arts and Sciences to the Weatherhead School of Management a number of years ago. The transfer was at the request of the department faculty, but such consent is not required.



of Pittsburgh chapter of Pi Lambda Phi, the individual law schools and faculties who are members of FAIR are not associations that are protected under the First Amendment.<sup>171</sup> The associations whose rights *are* protected are the universities (or the other entities) which operate the law schools.

Three thought experiments make clear why this is so. First, imagine that a university has a law school and determines that the law school is no longer serving the university's educational mission or that the university can no longer afford to operate the law school.<sup>172</sup> Can the university close the law school over the objections of its faculty? Clearly, the answer is yes. The university, not the law school faculty, owns the law school physical plant, other assets (e.g., library books), and the intellectual property (such as trademarks) of the law school.

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<sup>171</sup> This issue arose in a peripheral way in the district court, in the context of a challenge to FAIR's standing by the government. Examining the issue in the context of a standing challenge, however, meant that the district court did not fully explore the issue. The court held only:

The Court also rejects the Government's argument that the named FAIR members do not have standing in their own right because there is no allegation that, as mere components of a larger parent university, the schools are "entitled" to bring suit on their own behalf, "potentially against the wishes of the parent institution." In support of that proposition the Government cites only to the *Hunt* requirement that members have standing in their own right. That requirement goes to whether members satisfy the injury, causation, and redressability factors for Article III standing, and not to whether members have either the capacity to bring suit or the blessings of their respective parent institutions to do so. See *Felson v. Miller*, 674 F. Supp. 975, 977-78 (E.D.N.Y. 1987) (explaining difference between standing and capacity to sue). The Court declines to impose the capacity requirement requested by the Government for purposes of standing.

FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 289-90 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

<sup>172</sup> This almost happened recently. The University of Hawaii considered closing its law school in 1995. See Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155, 155 & n.2 (1998). Restructuring, by closing programs and dismissing staff and faculty, became more common in the 1980s. *Id.* at 165 & n.45. Significantly, Beh does not bother to include faculty claims in her analysis because faculty claims under such circumstances focus on whether there is sufficient financial exigency to justify closure and whether or not contract procedures were followed in terminating the faculty. *Id.* at 197-98 n.198. Beh makes no mention of any potential faculty claim to override the university decision. Moreover, the limited rights faculty do have flow from the grant of tenure, which restricts the ability of the university to discharge the faculty, not the university's rights to manage its subunits.

Second, imagine that a university is contemplating making a major change in its mission that affects the character of the law school. Can the faculty stop it from doing so if the trustees vote to make the change? The answer is clearly no.<sup>173</sup>

Third, can the university manage the law school's assets in the university's interests rather than the law school's more particular interests? The answer is clearly yes.<sup>174</sup>

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<sup>173</sup> This happened. See *Steenek v. Univ. of Bridgeport*, No. CV 93 0133773, 1994 WL 463629, at \*1, \*9 (Conn. Super. Ct. Aug. 18, 1994) (rejecting litigation brought by students, alumni, donors, a former trustee, and a current trustee challenging the University of Bridgeport's affiliation with an organization controlled by the Unification Church), *aff'd*, 668 A.2d 688 (Conn. 1995). Interestingly, in light of their clear effort to surmount standing issues, the plaintiffs in the *Bridgeport* case did not recruit a faculty member to be a plaintiff, perhaps realizing that a faculty claim would be even weaker than the existing plaintiffs' claims. The law school at the University of Bridgeport solved its problem by leaving en masse and affiliating with Quinnipiac College. Significantly, although the dispute between the university and the law school included some preliminary legal skirmishing, the law school's departure was ultimately an agreed-upon one and took place only after the law school became a separate legal entity. See George Judson, *Bar Group Approves Transfer of U. of Bridgeport Law School*, N.Y. TIMES, Aug. 13, 1992, at B7 (describing transfer); Ken Myers, *Bridgeport Dean Staves Off Firing by Locking Himself in His Office*, NAT'L. L.J., Dec. 16, 1991, at 4 (describing conflict between law school and university); Andrew L. Yarrow, *Bridgeport U. Reviews Offer From Moon's Church*, N.Y. TIMES, Mar. 25, 1992, at B7 (noting that university had agreed to the transfer of law school to Quinnipiac College). See also American Association of University Professors, *Report on Academic Freedom and Tenure: University of Bridgeport*, ACADEME, Nov.-Dec. 1993, available at <http://www.aaup.org/Com-a/Institutions/archives/pre1995/bridgeport.pdf> (describing academic freedom and tenure issues at university generally).

<sup>174</sup> See *In re Antioch Univ.*, 418 A.2d 105 (D.C. 1980). The court noted that [a]fter an evidentiary hearing of three weeks, the only legal theory of relief which could be discerned by the trial court was that "the revenues and assets of the Law School are subject to a charitable trust, and that surrender of these assets to the University's central administration will result in a breach of that trust."

*Id.* at 111. This points to the lack of independent associational status of law schools. On appeal, the *Antioch* plaintiffs attempted to assert a contractual claim, arguing that the law school and university had contractually committed to a degree of independence for the law school. The court rejected this claim:

The University is a not-for-profit corporation organized under the law of the state of Ohio. The University, as any corporation, is governed by the statutes of the state of its incorporation, its articles of incorporation and its bylaws. The law school "is not organized as a corporation or other judicial entity."

*Id.* at 112. The plaintiffs also sought to estop the university based on its acquiescence in prior independent management of the law school. The court also rejected this claim, finding that [t]his doctrine can have no relevance unless the party who seeks to invoke it is an independent entity from the one which is estopped. Thus, to apply the doctrine of estoppel on behalf of the Board of Gover-

Alert First Amendment fans undoubtedly will be thinking, "But does it matter if law faculties are formal associations? Can't they be some kind of informal association?" Certainly. However, to the extent that they are unincorporated associations of law faculty, they are *not* the governing bodies of the law schools in question. If at a faculty meeting, for example, a faculty member proposes a resolution that states: "Resolved, no employer who refuses to sign the school's non-discrimination policy may use the CSO facilities," and it passes, the faculty is acting pursuant to its delegated authority from the university board. The university can in these circumstances (and, in some cases, did) override the law school. The faculty is not in this instance acting as an association of the faculty members. However, if the faculty member proposes a resolution stating: "Resolved, this faculty condemns Congress's 'Don't Ask, Don't Tell' policy as antithetical to the values of this law school faculty," and it passes, the law school faculty is acting in its capacity as an expressive association but not in its capacity as an official body of the university using delegated powers from the board.<sup>175</sup> Thus, to the extent that a faculty is an expressive association, it is no longer an official university body and loses its interest in the university finances or the law school career services office.

If we examine the reactions of law schools to the Solomon Amendment, we find additional support for the claim that law school faculties are not the entity with the ultimate power to determine law school policies. Three things might have happened at universities in response to the changes in the Solomon Amendment that placed the larger universities' interests in jeopardy.

1. The law school faculty might have decided that it could not risk the larger university's federal funds and have changed its career services policies in response to the federal law. For example, at Yale Law School, the faculty voted to give the dean the authority to suspend the nondiscrimination policy with respect to the military if the dean determined that it was necessary to do so to preserve the university's federal funding (\$300 million in Yale University's case).<sup>176</sup> The dean then did so.<sup>177</sup>

2. University administrations might have instructed law schools and faculties to change their policies to avoid the loss of federal funding for the university as a whole. For example, at New York University, the university president (a former law school dean) wrote to the law school dean:

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nors or the law school, the trial court would have been required to find that these bodies are independent legal entities from the University.

*Id.*

<sup>175</sup> It seems implausible that university boards would freely delegate authority to issue resolutions that had any binding effect on the university to the faculty outside of the rules and procedures of the university.

<sup>176</sup> Declaration of William N. Eskridge, Jr., ¶ 43, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433), [hereinafter Eskridge Declaration], available at <http://www.law.georgetown.edu/solomon/Documents/Eskridge.pdf> (last visited Aug. 7, 2005).

<sup>177</sup> *Id.* ¶ 57.

This risk [of the loss of the \$130 million in federal funds] to the scholarly and scientific pursuits of colleagues throughout the University is one that I reluctantly must deem unacceptable, and accordingly, I must direct you to instruct your staff to implement the measures required to provide recruiters from the Armed Forces equal access to School of Law students and placement and career events and facilities . . . .<sup>178</sup>

The law school then complied.<sup>179</sup>

3. The law school might have refused to alter its policies and the school and its associated university would then have lost the covered federal funds. I am unaware of any law schools where this occurred.<sup>180</sup>

The failure of law schools to refuse to comply with the Solomon Amendment (i.e. to choose option 3) reinforces the conclusion that law schools and law faculties are not independent associations but subordinate units of universities. Given the serious harm the law schools allege has occurred to their interests as a result of the admission of military recruiters with equal status to their career services offices,<sup>181</sup> if law schools had the right to refuse to comply with the Solomon Amendment despite university instructions to the contrary, it seems implausible to suppose that at least some would not have done so.<sup>182</sup> This is reinforced by the fact that under the earlier versions of the Solomon Amendment in which only law schools lost funding for non-compliance, some law schools did not allow military recruiters.

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<sup>178</sup> Declaration of Sylvia A. Law at Ex. 12, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433), available at <http://www.law.georgetown.edu/solomon/Documents/law.pdf> (last visited Sept. 12, 2005).

<sup>179</sup> *Id.* ¶ 20.

<sup>180</sup> I cannot exclude the possibility that some law school did pursue this course of action, although it appears unlikely. The Third Circuit opinion stated that “[i]n light of the millions of dollars at stake, every law school that receives federal funds had, by the 2003 recruiting season, suspended its nondiscrimination policy as applied to military recruiters.” *FAIR*, 390 F.3d at 228. The opinion did not specify how the court had determined this, however, as it provided no citation to the record.

<sup>181</sup> Second Amended Complaint, *supra* note 9, ¶¶ 50–51.

<sup>182</sup> There is an alternative explanation consistent with the autonomous character claimed by the law schools. It may be that law schools value the antidiscrimination principle less than they value the loss of federal funds to the other units of the university with whom they must interact on other issues. Law schools may not wish to admit that they have put a specific price tag on the expressive message of nondiscrimination which they contend they can no longer send. Being required to be honest about one’s preferences is not a constitutional injury, however.

### 3. Associations and Exit

There are two critical features of associations that have not been addressed by the existing case law: all members of associations have a cheap-to-exercise right of exit,<sup>183</sup> and formation of associations is trivially easy.<sup>184</sup> Thus, Hurley and his fellow South Boston veterans can form the South Boston Allied War Veterans Council. If Hurley and his associates' attitudes toward gays, lesbians, and bisexuals are offensive to some veterans, those offended can leave and form their own veterans council. If Hurley then attempts to join the new organization, it can refuse him entry. The ease of exit and formation is significant because it eliminates in many cases the need for state intervention into associations' internal affairs. It also reduces the need to restrict the state in the sort of bargains it offers to associations, since members of an association who object to the association's acceptance of a particular bargain can secede from it and form their own organization.

The hitch in relying on a competitive market for associations to resolve these sorts of disputes arises when being part of a particular association has significant value, generally by virtue of the association holding a monopoly of some kind.<sup>185</sup> Sacrificing current associational ties is more costly when doing so requires giving up something of value. Thus, the South Boston veterans controlled access to the Boston St. Patrick's Day-Evacuation Day parade, in which participation is more highly valued than participation in an alternative parade organized by a hypothetical competing group because the South Boston veterans' parade is *the* parade in Boston on St. Patrick's Day — it gets television coverage, many participants, and a large crowd.<sup>186</sup> If the reason that the South Boston veterans parade is more valuable than its rivals' parades is because the South Boston veterans have obtained a monopoly on the St. Patrick's Day-Evacuation Day parade through state intervention (i.e., there is only one parade permit available per day, and the South Boston veterans get first choice of days because Boston politicians like them better than other organizations), there are potential constitutional issues.<sup>187</sup>

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<sup>183</sup> Epstein, *supra* note 115, at 120 ("In a regime of freedom of association, all agreements require unanimous consent, and any individual can withhold consent at will.").

<sup>184</sup> If I wish to form an association, I simply do so. Nothing more is required. You are free to do the same. (Whether either of us can convince anyone else to join or stay in the association is another question.)

<sup>185</sup> Epstein, *supra* note 115, at 121. Professor Richard Epstein has made the monopoly point central to his analysis of the expressive association cases: "Quite simply, the instinct runs as follows. The monopolist leaves his customers with no choice save that of doing without. To offset that powerful advantage, he is therefore obliged to take all customers and to do so at reasonable and (perhaps) nondiscriminatory rates." *Id.*

<sup>186</sup> Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 560–62 (1995).

<sup>187</sup> This was not alleged in *Hurley*.

Monopoly created by state-imposed barriers to entry need not be the only source of value, however. For many people, being a Boy Scout is more valuable than being some other kind of scout because of the Boy Scouts' reputation, history, and significant national organizational support for local troops. In such cases, exit will be costly because it entails giving up access to valuable assets.<sup>188</sup> There is no constitutional issue, however, because having unpleasant choices (between principles and merit badges, for example) is not a constitutional injury.

Outside of the state-imposed monopoly case, therefore, we can rely on the low cost of entry and exit to allow associations to form and reform in response to their members' preferences. Leaving one association for another is rarely costless, but the costs will rarely be of constitutional dimension. State action may create additional hard cases (by forbidding certain associations through antidiscrimination laws, for example), but in the marketplace of ideas, recognition of the ease of entry and exit suggests that the most important remedy for dislike of a particular association is to create a new one more to your liking.

The case for state intervention into the internal affairs of private associations thus rests entirely on two conditions, both of which must be present to justify state interference. First, there must be some sort of state-sanctioned monopoly that prevents the normal competition among associations within the marketplace of ideas from solving the problem through exit and creation of new associations. Second, the state intervention must be aimed at *increasing* access to the monopolized good.

In the case of the Solomon Amendment, both conditions are satisfied. First, there are significant barriers to entry in the law school market (ABA standards, for example), and competition amongst law schools is highly restricted by the combined efforts of the ABA and the AALS. These restrictions on competition involve state-created barriers to entry in the form of restrictions on access to bar exams.<sup>189</sup> This reinforces the case for the Solomon Amendment's constitutionality.

Second, if we consider students' interests, as we should in any analysis of law schools' associational freedom since students are a significant part of law schools,<sup>190</sup>

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<sup>188</sup> To the extent that the Boy Scouts have differentiated their product, they have market power. This is not a constitutional concern, however, because it is not the product of state action.

<sup>189</sup> The ABA and AALS lobbied both for bar exams and for restricting applicants to graduates of approved schools. See STEVENS, *supra* note 20, at 172–80; see also Fossum, *supra* note 23, at 516 (noting that ABA standards are tied to bar admission requirements).

<sup>190</sup> Somewhat ironically, Professor Erwin Chemerinsky, who filed a declaration on behalf of FAIR, Declaration of Erwin Chemerinsky, FAIR v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004), available at <http://www.law.georgetown.edu/solomon/Documents/Chemerinsky.pdf> (last visited Aug. 6, 2005), made a similar argument against the Supreme Court's decision in *Dale* in a recent article coauthored with Professor Catherine Fisk. Chemerinsky & Fisk, *supra* note 103. Rather than look to the Boy Scouts' leaders for articulation of the organization's interests, something Chemerinsky and Fisk aptly term the "corporate governance approach" and suggest is the "central flaw" in *Dale*, they argued that "expressive associational rights are, at least in large part, the rights of the individual members of the

the law schools' cartelization of legal education has resulted in *reducing* opportunities for students to interview with military recruiters. There may well be excellent educational reasons, as the law schools assert, for law schools to have such a policy.<sup>191</sup> However, the lack of a competitive market in legal education means that the courts must consider not only the associational freedom of the law schools (if any) but also the associational freedom of law students. Upholding the Solomon Amendment enhances the associational freedom of the law students (giving them more opportunities to associate, which they need not accept)<sup>192</sup> even if it reduces the associational freedom of the law schools (by giving them a hard choice about the costs of excluding military recruiters).<sup>193</sup> One additional implication of considering the costs of association for the law faculties unhappy with their universities' decisions about compliance with the Solomon Amendment is that creating a law school outside of a university eliminates the risk of losing substantial federal funds.<sup>194</sup> As noted

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group." *Id.* at 604–05. Instead, the courts should consider that "[t]he views of the members of the group are crucial in determining the expressive message of the organization." *Id.* at 606. When Chemerinsky and Fisk examined the Boy Scouts, they found that "the vast majority of parents and children associate with the Boy Scouts because of the activities and experiences it offers; unlike the Nazis, the Boy Scouts' views on homosexuality is peripheral to the goals of the group." *Id.* at 608. In the case of law schools, the position of the "parents and children" in the above analysis is occupied by law students, not law faculties. Chemerinsky and Fisk ask, "Do the members of the Boy Scouts join it because of, or in spite of, or even knowing of, its anti-gay message?" *Id.* at 609. In this case, we would have to ask "Do law students attend law schools because of, or in spite of, or even knowing of, their anti-military-because-it-discriminates message?"

<sup>191</sup> Second Amended Complaint, *supra* note 9, ¶ 24.

By implementing this policy, the school conveys a message that law school personnel will not abet the discriminating employer's recruiting efforts. To do otherwise is antithetical to both the law schools' message and mission. This policy has substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures, values that law faculty hope students will internalize, and the policy reifies those values, modeling behavior that it hopes its students will follow in their law practices and lives as community leaders.

*Id.*

<sup>192</sup> Presumably many law students have no desire to associate with military recruiters. Some may even find military recruiters' presence distasteful. But these are not constitutional injuries.

<sup>193</sup> I do not mean to suggest that any positive right to associate exists, only that the courts should weigh the net impact on associational freedom on the components of an association when considering an association's claims.

<sup>194</sup> Of course, starting a new law school is not a trivial endeavor. The accreditation (final or provisional) of eleven new law schools since 1995, however, suggests it is not an impossible burden either. Indeed, New York Law School was formed by Columbia University law school faculty in response to perceived interference by the university in the law school's affairs. See *A History of New York Law School, Founded in 1891*, <http://www.nyls.edu/pages/2341.asp> (last visited Sept. 12, 2005) ("New York Law School was established in 1891 by Columbia College School of Law faculty, students, and alumni who were protesting their

earlier, conducting legal education from within a university was a deliberate choice by elite law schools to gain their financial independence and to exclude the 'lower class' law schools serving a less elite population. This choice can be changed.

Suppose, for example, that the Yale Law School faculty were to resign en masse and form the independent New Haven Law School ("NHLS"). (I do not wish to pick on Yale; I chose it as an example because its prominence and generally accepted quality mean that its faculty would have little difficulty getting virtually automatic AALS membership and ABA accreditation).<sup>195</sup> Among its policies would be a ban on employers who did not comply with the school's nondiscrimination policy and replication of all aspects of the former Yale Law School.<sup>196</sup> In short, the NHLS would carry with it the Yale Law School's academic reputation but not its endowment. Although the faculty might have to accept lower wages (at least for a time) or teach additional courses (again, possibly only temporarily), they could also raise funds based on their bold, decisive action, potentially offsetting the losses.<sup>197</sup>

There can be no doubt that the NHLS would quickly gain both ABA accreditation and AALS membership, given the widely acknowledged quality of its faculty and programs and the circumstances of its founding. Within only a few years, NHLS would likely be in the top ranks of *U.S. News* and other rankings, just as Yale is now. Yale University's federal funding would no longer be at risk, and that university might even consider a contractual arrangement with the NHLS (like the joint degree program between Princeton's Woodrow Wilson school and NYU's law school)<sup>198</sup> to allow dual degree programs and other interdisciplinary work. Indeed, Yale might forego reconstituting its law school (at least for a time) out of respect for the law faculty's action. Such an act would carry some risks for the faculty, but it would also make a bold statement in favor of the nondiscrimination policy endorsed by the faculty. Why don't they do this? I suggest this does not happen because law faculties want to have their oligopolistic cake and eat it too. Not being able to do so does not rise to the level of a constitutional harm.

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trustees' attempts to dictate the teaching methods used by professors.").

<sup>195</sup> Almost any law school in the *U.S. News* top 20 is likely to be in a similar position.

<sup>196</sup> Delaware did something similar to gain New Jersey's corporate law business. See Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976).

<sup>197</sup> Hillsdale College successfully replaced federal student aid funding with private funds to prevent having to comply with federal regulations to which it objected. See 136 CONG. REC. E. 3092, 3092 (1990) (quoting *Detroit News* story that "[w]hen the courts ruled that accepting students with federal scholarship aid meant that Hillsdale would have to knuckle under to Washington's red tape, the southern Michigan school simply replaced the government aid with scholarship money of its own."). I am indebted to Nathaniel Stewart for pointing out this success story.

<sup>198</sup> See NYU Law, *Joint Degree with Woodrow Wilson School at Princeton University*, <http://www.law.nyu.edu/depts/admissions/info/joint/princeton.html> (last visited Aug. 5, 2005).



Moreover, the oligopolistic nature of legal education creates an additional reason for Congress to be concerned about the military's access to career services programs at law schools.<sup>199</sup> When students enroll in a law school, they rely on the school's expertise with respect to their future education and employment, matters about which few entering students have significant knowledge. Indeed, this reliance is the basis for whatever claim the ABA and AALS might be able to make that their cartelization serves enrolled students' interests<sup>200</sup> or the interests of the broader community. Students have little prospect of exit, particularly after beginning their second year because law schools refuse to grant more than one year's transfer credit.<sup>201</sup> At the very least, we might consider whether something akin to a fiduciary obligation is created between the law schools and their students, given the relationship of trust and confidence that exists between them. The general rule in such cases is that the more the dependent party is at the mercy of the superior, the greater the government interest is in regulating the relationship to protect the dependent. Thus, although I do not believe there is a fiduciary relationship between law schools and law students, it seems to me that the *FAIR* plaintiffs are essentially arguing facts that would support the creation of such a relationship. The more they are successful at asserting such a claim, therefore, the more they have justified the congressional intervention in the form of the Solomon Amendment on the grounds of congressional concern for students' interests.

### III. THE WEIGHT OF THE GOVERNMENT'S INTEREST

The Third Circuit noted that it "presume[d] that the Government has a compelling interest in attracting talented military lawyers," but it found that this interest could be achieved through means other than equal access to law school career services offices.<sup>202</sup> Specifically, the court found that:

[u]nlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law school space or personnel. And while they may be

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<sup>199</sup> I am indebted to Robert G. Natelson for suggesting this point.

<sup>200</sup> Of course, the cartel effect limiting enrollments does not serve the interests of those students unable to gain admission.

<sup>201</sup> STANDARDS FOR APPROVAL, *supra* note 26, at 41 (2004).

<sup>202</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 234 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

more costly, the government has given us no reason to suspect that they are less effective than on-campus recruiting.<sup>203</sup>

As a result, the Third Circuit quickly dispensed with the government's interest as merely being the interest in the difference between these hypothetical alternative recruitment schemes made possible by the military's "ample resources" and making use of law school career services offices.<sup>204</sup> In so doing, the Third Circuit ignored an extensive line of Supreme Court precedent expressly prohibiting this type of analysis.

Traditionally the courts have given great deference to the political branches to organize the military. "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."<sup>205</sup> The deference stems from Congress's "broad and sweeping" powers in this area<sup>206</sup> and the lack of competence on the part of the courts to second guess Congressional decisions about military matters.<sup>207</sup> As the Supreme Court cautioned in an earlier case, in this area "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."<sup>208</sup> In this case, which directly implicates the congressional power to raise and support armies,<sup>209</sup> there is no question that such deference is compelled.

We need not speculate about the extent of judicial deference on military matters connected with staffing the military, however. There is Supreme Court precedent directly on point. In *Rostker v. Goldberg*, the Court rejected a constitutional challenge to the Selective Service registration system reinstituted by then-President

<sup>203</sup> *Id.* at 234–35.

<sup>204</sup> The Third Circuit performed one of my favorite judicial moves. Not only is the government interest smaller than the government thinks, but the Third Circuit noted that it may have actually forced the government to adopt a more effective military recruiting strategy, stating that: "Not only might other methods of recruitment yield acceptable results, they might actually fare better than the current system." *Id.* at 235. Even better, the government's interest might actually be harmed by the Solomon Amendment, making the Third Circuit's decision an improvement! "In fact, it may plausibly be the case that the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually *impedes* recruitment." *Id.* (citations omitted). Thank goodness we don't have to rely on *Congress* to decide such questions! *But see infra* note 208 and accompanying text.

<sup>205</sup> *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

<sup>206</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>207</sup> *Rostker*, 453 U.S. at 65 (stating that "the lack of competence on the part of the courts is marked" in this area); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.").

<sup>208</sup> *Rostker*, 453 U.S. at 68.

<sup>209</sup> *See supra* note 7.

Jimmy Carter and Congress in response to the Soviet invasion of Afghanistan.<sup>210</sup> The plaintiffs sought to overturn the registration system and argued that it violated the due process clause of the Fifth Amendment because only men were required to register, rather than both men and women.<sup>211</sup> The plaintiffs prevailed in the district court.<sup>212</sup>

The Supreme Court flatly and unambiguously rejected the district court's attempt to distinguish registration from military affairs by characterizing it as an activity involving civilians with only "indirect and attenuated" impact on the military:

We find these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, singularly unpersuasive. . . . Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction. Congressional judgments concerning registration and the draft are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well. Although the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization. It would be blinking reality to say that our precedents requiring deference to Congress in military affairs are not implicated by the present case.<sup>213</sup>

Further, the Court clearly and unambiguously rejected the attempts by the district court to distinguish the rationale for a male-only registration process from the military considerations that dictated the congressional policy of prohibiting women in combat:

The District Court stressed that the military need for women was irrelevant to the issue of their registration. As that court put it: "Congress could not constitutionally require registration under the MSSA of only black citizens or only white citizens, or single out any political or religious group simply because those groups contain sufficient persons to fill the needs of the Selective Service System." This reasoning is beside the point. The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Con-

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<sup>210</sup> 453 U.S. at 60–61.

<sup>211</sup> *Id.* at 61.

<sup>212</sup> *Id.* at 63.

<sup>213</sup> *Id.* at 68–69 (citations omitted).

gress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.<sup>214</sup>

If we examine these statements by the Court, we see that the courts are prohibited from second guessing congressional “judgments concerning military operations and needs.”<sup>215</sup> Moreover, the Court made clear that in structuring the military recruiting system based on those assessments, Congress is free to distinguish among groups based on their different status with respect to eligibility for military service.<sup>216</sup> In *Rostker*, the majority found that this deference precluded the courts from substituting their judgments about the need for or burden of registration of women.<sup>217</sup> The majority specifically rejected the efforts of Justices White, Marshall, and Brennan to make those judgments the subject of the kind of judicial inquiry engaged in by the Third Circuit in *FAIR v. Rumsfeld*.<sup>218</sup> *Rostker* is thus exactly on point with the present case.

Indeed, the Third Circuit’s speculation about alternative means of accomplishing the military’s objective of recruiting lawyers is precisely the kind of inquiry foreclosed by the deference due to Congress over matters of military staffing.<sup>219</sup> Congress has made a decision that openly homosexual people may not serve in the armed forces and codified it through the “Don’t Ask, Don’t Tell” policy. As a result, this congressional policy on homosexuals serving in the military allows the government to pursue a means of recruiting lawyers that excludes homosexuals. That policy includes using federal spending to gain equal access to the hiring halls conducted by law schools.

What the courts may not do is create their own substitute method of recruitment; they must defer to Congress’s determination that in pursuit of its military staffing policy, access to on-campus recruiting at law schools that provide on-campus recruit-

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<sup>214</sup> *Id.* at 78 (citation omitted).

<sup>215</sup> *Id.* at 68.

<sup>216</sup> *Id.* at 68–69.

<sup>217</sup> *Id.* at 68, 78.

<sup>218</sup> Justices Marshall and Brennan were not prepared to defer. *See id.* at 86 (Marshall, J., dissenting) (“The Court today places its imprimatur on one of the most potent remaining public expressions of ‘ancient canards about the proper role of women.’” (quoting *Philips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring))). Neither was Justice White. *See id.* at 83, 85 (White, J., dissenting) (suggesting the appropriate resolution is remand for hearings and findings on whether military needs require registration of women).

<sup>219</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 234–35 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

ing and do not qualify for the pacifist exemption, is necessary to recruit lawyers.<sup>220</sup> In *Rostker*, the congressional policy on women in combat permitted Congress to establish a male-only registration system. In this case, Congress's legal and constitutional limitation of opportunities for open homosexuals in the military allows it to take steps to ensure that the military has access to the primary pool of qualified lawyers despite that policy. In *Rostker*, the Supreme Court rejected both the dissenters' and the district court's attempts to show that Congress's decision was misguided.<sup>221</sup> In this case, the courts must also refrain from analyses dependent on rearguing matters settled by Congress.<sup>222</sup>

In particular, the Third Circuit's "ample resources" argument is barred.<sup>223</sup> The military may indeed have the resources to engage in a wide range of recruiting strategies, but the allocation of those resources is a matter for Congress and the President. The courts may not second-guess those resource allocations, nor may the courts, in weighing the government's interest in a method of recruitment, rely on their own view of the sufficiency of military resources for a particular task. The proper weight for the government's interest is thus not the marginal value of recruiting via law schools' career services offices over loan forgiveness or other hypothetical programs (which the Third Circuit hinted was negative).<sup>224</sup> Instead, it is the value to the government of the military being able to recruit lawyers in the manner

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<sup>220</sup> See generally Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, ARMY LAW., Dec. 2004, at 22 (describing combat support roles of army lawyers).

<sup>221</sup> For example, Justice Marshall argued that "the Government makes no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by registering both men and women but drafting only men if only men turn out to be needed." *Rostker*, 453 U.S. at 95 (Marshall, J., dissenting). This type of analysis is exactly what the Third Circuit's "ample resources" argument does. Note that the Court rejected the attempts to second guess, even though women, as a class protected by the Equal Protection Clause, receive greater protection than do non-suspect classes such as those based on sexual orientation. See *Romer v. Evans*, 517 U.S. 620, 631-36 (1996).

<sup>222</sup> The *Rostker* court laid great stress on the extensive deliberation in Congress over the question of whether to require women to register with the Selective Service Administration. *Rostker*, 453 U.S. at 74 ("The issue was considered at great length, and Congress clearly expressed its purpose and intent."). In this case, the long history of the Solomon Amendment's various forms demonstrates that Congress similarly gave sufficient thought to the issue to warrant deference to its judgment. Complaint ¶ 27, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), cert. granted, 125 S. Ct. 1977 (2005) (No. 03-4433), available at <http://www.law.georgetown.edu/solomon/FairVRumsfeld.html>.

<sup>223</sup> This argument also suggests that the judges do not understand the concept of "opportunity costs." "Perhaps the most fundamental concept in economics, the opportunity cost of an action is the value of the foregone alternative action." *Opportunity Costs*, in THE MIT DICTIONARY OF MODERN ECONOMICS, *supra* note 50, at 315.

<sup>224</sup> *FAIR*, 390 F.3d at 235.

chosen by Congress, which is considerably greater than the Third Circuit's marginal value calculation.

Of course, the law schools and law faculties in *FAIR* are not attempting to have the courts say that the military cannot recruit lawyers. But what *Rostker* teaches is that the courts may not second guess Congress on its decisions about the structure of the military so long as Congress is not violating constitutional provisions (e.g., the Third Amendment by requiring the law schools to provide living quarters for recruiters).<sup>225</sup> Congress's assessment that military recruiters need equal access cannot be replaced by either the Third Circuit or *FAIR*'s opinion that they do not. On the contrary, Congress's judgment is entitled to great deference from the courts. To overturn Congress's judgment requires showing a constitutional violation in the implementation of that judgment. This in turn requires showing that the law schools and law faculties have an interest worth protecting which is affected by the Solomon Amendment, an issue to which we now turn with an analysis of the weight of the law schools' interests.

#### IV. THE WEIGHT OF THE LAW SCHOOLS' INTERESTS

Briefly stated, *FAIR* asserts that the law schools' interests in evading the Solomon Amendment's sanctions derive from law schools' educational model. In its trial brief, *FAIR* gave this succinct statement of the argument:

Law schools aspire to be much more than vocational schools that teach "students to draft briefs, argue motions, depose witnesses, and close deals." Whether a law school describes itself as "a law school with a social conscience as well as an analytical mind," or as "the place of instruction in all sound learning relating to the foundations of justice," the universal foundation of virtually all American law schools is the same: Law schools are, and self-consciously define themselves as, shapers of future lawyers who "can profoundly change our society, its mores and values." They tell their students that "issues of justice are at the

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<sup>225</sup> *Rostker*, 453 U.S. at 67:

None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference . . .

core of [their] mission” and they ask them “to accept the challenge of more clearly defining a just system.”<sup>226</sup>

Tied to this view is a strong emphasis on nondiscrimination, which extends to the law schools’ career services offices.<sup>227</sup> When a law school retreated in the face of the later, more effective versions of the Solomon Amendment, FAIR argues, “some students and faculty . . . [came] to believe that the school is not in fact committed to non-discrimination and that the law school has lost credibility to preach values of equality, justice, and human dignity.”<sup>228</sup> As a result of students’ loss of faith in the law schools, “the Solomon Amendment has undermined the institutions’ core mission of teaching about justice and its mission to foster an environment of openness and tolerance where the free exchange of ideas could flourish.”<sup>229</sup>

*A. Overstating the Impact of Military Recruiters’ Physical Presence*

FAIR’s argument grossly overstates the impact of the presence of military recruiters and neglects to take into account the structure of the legal education industry. Let us begin with a critically important difference between the Boy Scouts in *Dale* and the law schools in *FAIR*. *Dale* involved an attempt by New Jersey to require the Boy Scouts to accept as a member — and not just any member, but a leader — an individual whose conduct and views were at odds with the organization’s views.<sup>230</sup> In *FAIR*, on the other hand, the law schools are not asked to accept military recruiters as staff members, faculty members, or students (the three groups which might conceivably be analogous to being a member of the Boy Scouts). Rather the law schools are required only to allow military recruiters access to their career services offices on the same terms as other employers are given such access.<sup>231</sup> Further, the law schools are not foreswearing all cooperation with discriminatory employers, only allowing them a physical presence for on-campus interviews. Law schools continue to cooperate with the military by providing official transcripts, for example. The *FAIR* plaintiffs and the Third Circuit make much of the success the

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<sup>226</sup> Plaintiffs’ Trial Brief, *supra* note 70, at 4 (citations omitted).

<sup>227</sup> *Id.* at 5.

<sup>228</sup> *Id.* at 15.

<sup>229</sup> *Id.* at 17.

<sup>230</sup> See Farber, *supra* note 147, at 1501 (“[C]ases to date have involved a fairly strong nexus between membership and the choice of speakers, they may not be decisive in situations where the nexus is weaker.”).

<sup>231</sup> 10 U.S.C. § 983(b) (2003). And, of course, law schools can eliminate on-campus interviews entirely if they choose and not lose federal funds eligibility for their universities by then excluding the military.

military enjoys with the law schools' limited cooperation.<sup>232</sup> Compared to the intrusion in *Dale*, this is small potatoes. As a leader, Mr. Dale would be representing the Boy Scouts. As recruiters, any military personnel in the Career Services Office of a law school would not be representing the law school.<sup>233</sup>

The Third Circuit rejected this distinction for two reasons: (1) relying on its prior decision in *Circle School*, even minimally intrusive messages are unconstitutional;<sup>234</sup> and (2) *Dale* requires a high degree of deference to the burdened entity on whether the interest is significant.<sup>235</sup> Neither of these rationales holds water.

In *Circle School*, the court rejected a state statute that compelled private (as well as public) schools to have their students recite the Pledge of Allegiance and sing the national anthem each day and to have teachers report students who failed to do so to the students' parents.<sup>236</sup> The plaintiff schools objected because this interfered with their educational philosophy of emphasizing student choice.<sup>237</sup> Conceding that the recitation and singing took very little time out of the school day, the earlier panel of the Third Circuit nevertheless held the statute unconstitutional.<sup>238</sup>

The facts of *Circle School* are readily distinguishable from *FAIR v. Rumsfeld*, however. In the former, Pennsylvania sought to conscript school personnel to deliver explicitly a state-endorsed message of patriotism. In *FAIR*, the law schools are not asked to do anything beyond allowing the military recruiters to deliver their own message on the same terms as other recruiters. Although in the absence of additional speech from the law schools, a law student might conceivably infer some endorsement of the military's hiring policies from the presence of the military recruiter in the career services office,<sup>239</sup> nothing in the Solomon Amendment prevents the law schools and faculties from vigorously denouncing the military's policy toward homosexuals, petitioning Congress to change the policy, writing articles on the evils of the policy, or taking a multitude of other steps to prevent such an impression. Indeed, the AALS requires member law schools to take such steps.<sup>240</sup>

<sup>232</sup> Third Circuit Brief for Appellants, *supra* note 88, at 10–11.

<sup>233</sup> The district court made this point in distinguishing *Dale*. *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 305–06 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

<sup>234</sup> 381 F.3d 172 (3d Cir. 2004).

<sup>235</sup> *FAIR*, 390 F.3d at 230–35.

<sup>236</sup> *Circle School*, 381 F.3d at 174–75.

<sup>237</sup> *Id.* at 182.

<sup>238</sup> *Id.* at 182–83.

<sup>239</sup> Such a student should be receiving poor grades in law school for making such a deduction based on faulty logic.

<sup>240</sup> Brief of Amicus Curiae Ass'n of Am. Law Schools in Support of Appellants at 3, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005). Somewhat disingenuously, the AALS told the appeals court that the Solomon Amendment presents its members with a "Hobson's choice" by forcing them to choose between forsaking federal funds and being "stripped" of their memberships in the AALS. *Id.* Of course, since



The rejection of disclaimers as insufficient in *Circle School* does not apply to *FAIR v. Rumsfeld* for two reasons. First, the problematic nature of the disclaimers in the former rests on the contradiction between the school's explicit behavior (requiring the pledge and song; reporting those who do not comply) and the disclaimer (we don't like doing this), putting the school in the position of advocating and denying student choice. Law schools are not asked by the Solomon Amendment to require any expressive behavior by any persons associated with the law school.<sup>241</sup>

Second, law schools have a variety of means available to them of disclaiming discrimination not available to the schools attempting to disclaim the mandatory patriotic message. Law schools could, for example, require students to attend diversity workshops that address discrimination based on sexual orientation, or to take classes on antidiscrimination law; hold public forums, panel discussions, or symposia on sexual orientation discrimination; publish articles by faculty in their own and other journals; and add antidiscrimination components to other law school courses (as many schools do with legal ethics). None of these efforts would violate the Solomon Amendment. None would put the law schools in the position of the plaintiff schools in *Circle School* of acting out the very behavior they seek to condemn.

Moreover, the Third Circuit's notion of "*Dale* deference"<sup>242</sup> comes from its strained reading of *Dale*'s reversal of the New Jersey Supreme Court's decision.<sup>243</sup> According to the Third Circuit, the Supreme Court was "faced with competing views — the Boy Scouts' view that *Dale*'s presence impaired their message and the state court's view that it could not — the Supreme Court deferred to the Boy Scouts' view."<sup>244</sup> We don't learn much more about "*Dale* deference" from the Third Circuit opinion other than "*FAIR* . . . supplied written evidence of its belief that the Solomon Amendment's forcible inclusion of and assistance to military recruiters undermines their efforts to disseminate their chosen message of nondiscrimination" required to succeed on their claim.<sup>245</sup> If true, of course, this reduces *Dale*'s second

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the AALS members determine AALS policy, it is quite likely that the organization would allow (as it has in the past) members to comply with the Solomon Amendment without losing their membership; if it did not, there would be no members left.

<sup>241</sup> Note that law schools are forbidden from granting class credit for CSO activities by ABA rules, further distinguishing the educational component from the career services function. STANDARDS FOR APPROVAL, *supra* note 26, at 28–30 (2004).

<sup>242</sup> *FAIR*, 390 F.3d at 233.

<sup>243</sup> To be fair, it is hard to understand *Dale* on this point. See *Hills*, *supra* note 115, at 215 ("[O]ne looks in vain to *Dale* for some persuasive, principled, or even predictable limit on the First Amendment protections enjoyed by associations."); McGowan, *supra* note 134, at 125 ("The Court's stated deference was inconsistent with its analysis in prior cases, raised questions about the degree to which the speech clause protects expression rather than the managerial discretion of expressive groups, and left the doctrine in an unsettled state.").

<sup>244</sup> *FAIR*, 390 F.3d at 233.

<sup>245</sup> *Id.* at 233–34.

element to a requirement that the plaintiff provide some affidavits in support of its claim.<sup>246</sup>

The Supreme Court has *never* treated plaintiffs' claims with such uncritical acceptance in associational freedom cases.<sup>247</sup> The Third Circuit attempts to explain away this history by suggesting that the cases in which the Rotary Club and Jaycees were forced to comply with antidiscrimination laws and admit women are distinguishable from *Dale* because the Supreme Court "examined the organizations' expressive charitable and humanitarian purposes and determined that they would not be impaired by the forced inclusion of women members," something that was not true in *Dale*.<sup>248</sup> Unfortunately for this reading of *Dale*, whatever it was that the Supreme Court did in the Rotary and Jaycees cases, it surely does not qualify as "deference" to either organization. (As both groups invested the resources to litigate their cases to the Supreme Court, they must have had strong feelings that the proper outcome was not the one they got.) The Third Circuit's notion of "*Dale* deference" is thus incoherent.

#### *B. Overstating the Interest of Law Faculties in CSO Operations*

The Third Circuit gave great weight to the *FAIR* plaintiffs' asserted interest in managing their law schools' career services office operations as part of the educational mission of the law schools.<sup>249</sup> Doing so fundamentally misunderstands the role of faculties in law school administration.

Law school faculties play an important role in a variety of aspects of law school governance; the exact role varies from institution to institution. At some, elected faculty executive committees oversee everything from faculty salaries to the overall budget. At others, faculty governance is exercised through less formal means. In all cases, however, faculty governance is a creature of the university's own internal rules and regulations. Although the precise nature of faculty governance varies, we can turn to the American Association of University Professors (AAUP) "Red Book" for a faculty-oriented perspective on the importance of faculty contributions in such

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<sup>246</sup> As Professor Hills notes,

[T]here must be some limit to this deference if *Dale* is not to gut the nation's antidiscrimination laws. If Exxon declares that its shareholders' anti-union views will be impaired by complying with the Wagner Act, does this assertion give Exxon immunity from laws protecting collective bargaining? One assumes not, but one looks in vain to *Dale* for some persuasive, principled, or even predictable limit on the First Amendment protections enjoyed by associations.

Hills, *supra* note 115, at 215.

<sup>247</sup> See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

<sup>248</sup> *FAIR*, 390 F.3d at 233 n.12.

<sup>249</sup> *Id.* at 237–39.

matters. According to the report *On the Relationship of Faculty Governance to Academic Freedom*, which is included in the "Red Book," the relationship among the board, administration, and faculty of a university is guided by the general principle that "'differences in the weight of each voice, from one point to the next, should be determined by reference to the responsibility of each component for the particular matter at hand.'"<sup>250</sup> The example the AAUP used to illustrate this principle is the faculty's role in teaching and research.<sup>251</sup> Since both the organization of career services programs and the choices about federal funding are primarily administrative functions, the faculty's voice is due less weight.<sup>252</sup> Thus even the AAUP, an organization dedicated to the rights of faculty, adheres to principles which suggest that the faculty prerogative in such matters of relatively little import. Moreover, the limitation of choice imposed by the cartelization of legal education again rears its head. If it were not for the restrictions on competition created by the ABA/AALS oligopoly, students could choose to go to a school that either did not have an anti-discrimination policy that violated the Solomon Amendment or one that refused to accept federal funds. Because law schools and law faculties stand astride the choke point between students and employment, however, their actions both deserve more scrutiny and are entitled to less weight.

The Third Circuit found a "compelling analogy"<sup>253</sup> between the interests asserted by FAIR and the interests asserted by the Boy Scouts in *Dale*. The Boy Scouts thought homosexual conduct was inconsistent with the Scout Oath; the law schools think discrimination against homosexuals is inconsistent with their values. The Boy Scouts thought homosexuals did not provide appropriate role models; the law schools think employers who discriminate do not provide appropriate role models. The Boy Scouts teach by example; the law schools teach by example. A homosexual Boy Scout Leader would send a message that the organization accepted homosexual conduct; a discriminatory recruiter would send a message that the law

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<sup>250</sup> Am. Ass'n of Univ. Professors, *On the Relationship of Faculty Governance to Academic Freedom*, 80 ACADEME 47, 47 (July/Aug. 1994) (quoting from 1966 *Statement of Principles on Academic Freedom and Tenure*).

<sup>251</sup> *Id.* at 48. The interest of FAIR's members has nothing to do with academic freedom, since their asserted interest has nothing to do with the reasons for such freedom. See Richard T. De George, *Academic Freedom and Academic Tenure*, 27 J.C. & U.L. 595, 595-96 (2001) ("The rationale for academic freedom is the preservation and development of knowledge. . . . This rationale both justifies the autonomy of the university and the academic freedom of faculty members vis-à-vis both outside forces and the institution's administration.").

<sup>252</sup> A similar argument is made by Professor Luiz Zubrow in the context of student loan forgiveness programs, which subsidize recent graduates' acceptance of lower paying jobs. Professor Zubrow argues that faculty and deans are entitled to less deference in the structure of such financial aid programs because the goals of the program are unrelated to educational quality issues. See Luiz E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 GEO. WASH. L. REV. 451, 463 (1991).

<sup>253</sup> *FAIR*, 390 F.3d at 232.

schools accept employment discrimination.<sup>254</sup> According to the Third Circuit, FAIR wins, somewhat ironically, because the Boy Scouts can discriminate against homosexuals.<sup>255</sup>

The analogy falls apart, however, when we consider the actual faculty interest in controlling who is present in the building to conduct interviews and who must do so across campus.<sup>256</sup> This is a distinction only law professors could love — the educational mission of a law school is dramatically affected by a distance of what may be no more than a few hundred feet. The interest of the law schools in the physical location of military recruiters is simply not in the same category as the interest of the Boy Scouts in determining who represents the organization as a leader.

### CONCLUSION

The Supreme Court should overturn the Third Circuit's decision in *FAIR v. Rumsfeld*. It should do so because the law schools and law faculties in FAIR are not expressive associations, because the Third Circuit under-valued the interests of the government and failed to give proper deference to Congress's exercise of its constitutional authority to raise and support armies, and because the *FAIR* plaintiffs do not have an interest worthy of protection.

There is a broader point at stake here as well. Law faculties generally remain captivated by their vision of themselves as leaders of an effort to reform law to bring about a variety of progressive ends. There is powerful evidence, however, that most of the legal academy are not even talking to each other but to the mirror.<sup>257</sup> A comment (which drew many nods of agreement from the audience) at the SEALS conference where I presented this paper captures the essence of how this outlook influences faculty thinking: discrimination on the basis of sexual orientation is

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<sup>254</sup> See *id.*

<sup>255</sup> See generally Brief of Soc'y of Am. Law Teachers as Amicus Curiae, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 339882. FAIR is fortunate that there is not a principle of "amici-estoppel" applied to such filings.

<sup>256</sup> The Yale faculty, for example, seemed to have no problem with military recruiters conducting interviews at the student union. See Eskridge Declaration, *supra* note 176, ¶ 31.

<sup>257</sup> See Tom Smith, *A voice crying in the wilderness, and then just crying*, The Right Coast, <http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html> (last visited Dec. 12, 2005). Reporting the results from analysis of legal scholarship citation, Smith notes that:

43 percent of the articles are not cited . . . at all. Zero, nada, zilch. Almost 80 percent (i.e. 79 percent) of law review articles get ten or fewer citations. So where are all the citations going? Well, let's look at articles that get more than 100 citations. These are the elite. They make up less than 1 percent of all articles, .898 percent to be precise. They get, *is anybody listening out there?* 96 percent of all citations to law review articles. That's all. Only 96 percent.

*Id.*

morally wrong, and “I don’t want employers that discriminate on my campus.” All well, fine, and good if the last sentence ended “. . . in my house.” But it *isn’t* “our” campus in any sense of the word — law school campuses belong legally to the university, which is controlled by the board of trustees.<sup>258</sup> Morally, a wide range of groups have claims which are as good or better than the claims of law faculties: the students, the alumni, the broader university community, and the public at large all come to mind. Law faculties need to stop treating legal education as their private playgrounds. Losing *FAIR v. Rumsfeld* might be a wakeup call some of them will hear.

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<sup>258</sup> See Hills, *supra* note 115, at 185–87 (discussing reasons why academic freedom does not mean faculty have complete freedom from coercion).